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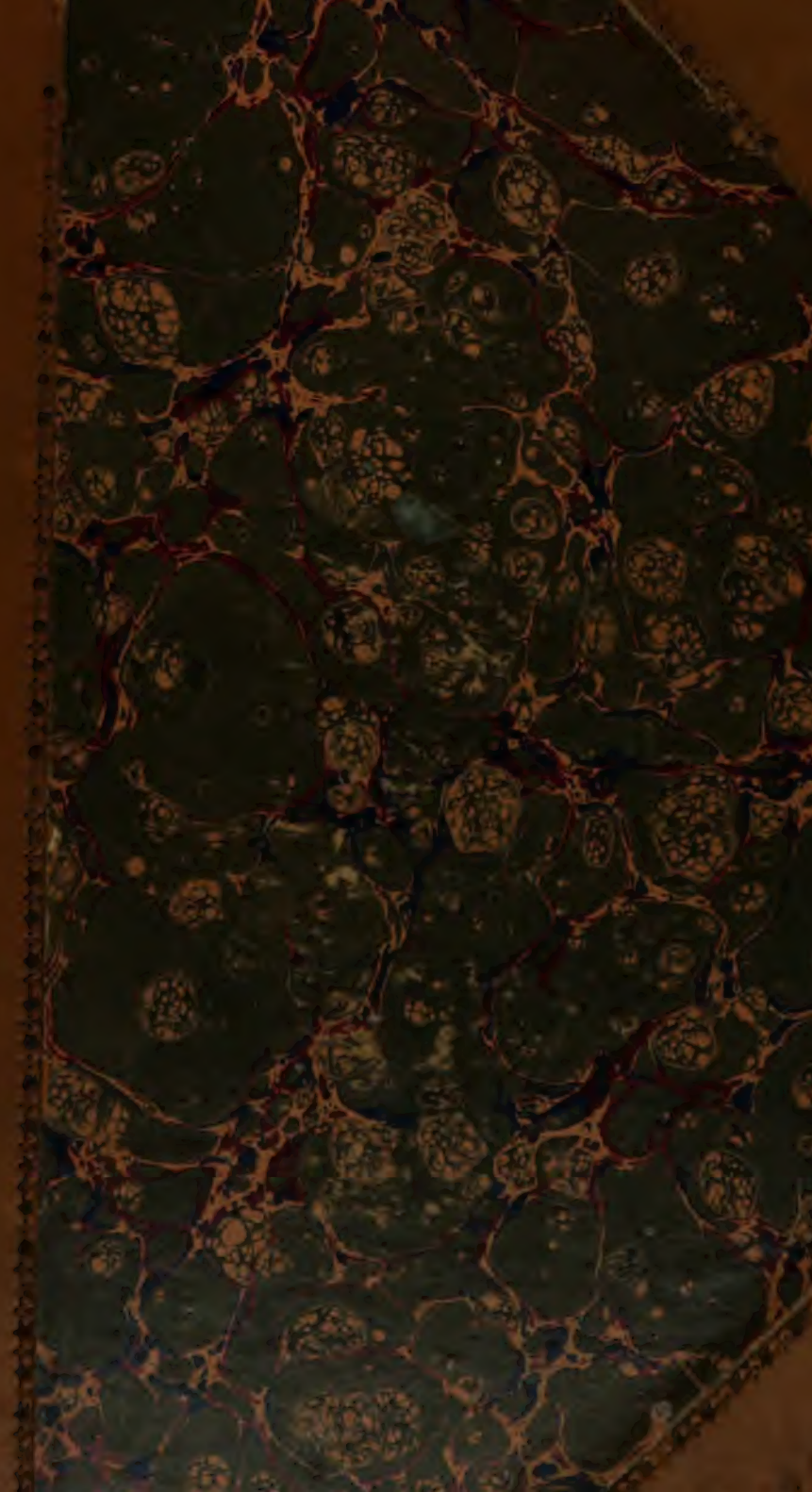
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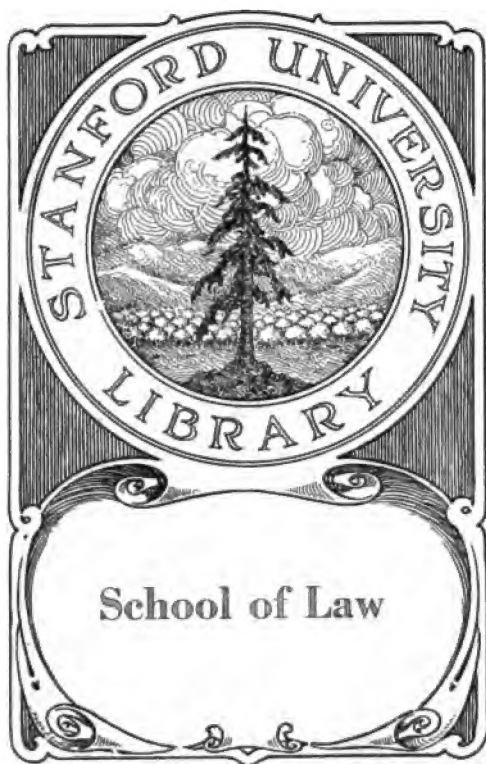
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*Charles Wingate,
Solicitor,
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THE JOURNAL OF JURISPRUDENCE.

THE DEVELOPMENT OF RIGHT, AND THE RIGHT OF DEVELOPMENT.

BY PROFESSOR BLUNTSCHLI, LATE OF THE UNIVERSITY
OF HEIDELBERG.

1. THE chief merit of the Historical School of Law is that it first recognised the fact that human Right is *capable of development*. Although Right subsists in lasting institutions and in continuously operative rules of law, yet neither of these has an absolutely immutable character, but both experience transformation and change in the progress of time. In so far as such transformation and change are not arbitrarily imposed from without, but are explained as arising from within, and out of the life of the peoples and of society, they undergo *development*. In the history of law the Development of Right is manifested in its inner connection and in its advancing formation.

The *Right of Development*, however, has not yet become so clearly realized in the general consciousness of law as the Development of Right. The science of jurisprudence has hitherto considered it only in particular manifestations, and almost accidentally, and not in general and in principle.

If, because the force of their relations compels it in the usage of the peoples, this Right of Development is practically exercised, yet there is still a feeling of uncertainty and doubt in the application of it. The confidence of the people in this their good right is still hesitating and incomplete. Nevertheless the Right of Development belongs to the *natural primary rights of men*.

2. By Right we mean the common order of human life which is necessarily recognised and protected by men. All Right has its root in the need and capacity of human nature for determining, establishing, and protecting the common order of life. All Right stands in a relation of subservience to human life. And all Right receives its actuality from the protection of men, especially from the protection of the State, to which alone belongs the power which may arrange and apply the compulsion of external means as rightful coercion.

3. There are many necessary laws of the common life of men which are not Laws of Right. Of this kind are the laws of the *universal physical order of Nature* which are operative in the nature of man: such as the law of gravity, of attraction and repulsion, of mechanical motion. These natural laws appear to us absolute, immutable, and eternal, because they pervade the universe and dwell in the great world of nature, and because they were operative before men, and will operate after them. Whether there is also a macrocosmic development capable of being discovered in these laws, is a question which it belongs to natural science and philosophy to examine and answer. For the short life of man, with which alone the science of jurisprudence has to do, the periods of time through which a macrocosmic development would have to pass, are so immeasurably great, that the order of nature in which we find ourselves will still appear to us as immutable and unchangeable even if we should recognise the possibility and even the reality of a macrocosmic development. These laws of Nature are not to be reckoned as belonging to the laws of Right, for the obvious reason that their power is completely independent of men and the State, and is in need of no human help. So far as her laws extend, Nature herself rules over men and States, and no one is strong enough to resist this macrocosmic dominion.

But neither are the laws of Nature in the lesser world of man—the microcosmic natural laws of birth and death, of growth and of the stages of life—to be regarded as laws of Right. These laws reveal the mutability of the microcosmic existence in the clearest light, and they also regulate beforehand the development of human life. They are not indeed independent of men, in the absolute sense, like the macrocosmic laws of Nature. The human will and human actions have an influence upon birth and death; and through education, labour, and enjoyment, they also have a modifying influence upon the development of the different stages of life. But taken as a whole, these laws are not subject to the power of the State, and they only need the aid of political right in the degree in which it becomes necessary to protect the existence of men and their sound development, from threatening dangers and assaults. In the establishment of human Right as a natural order of life, these laws are therefore presupposed and taken into account.

Further, the laws of the *logical faculty of Thought* are not to be regarded as laws of Right. By these logical laws are meant the laws that relate to the distinction of substance and attribute, cause and effect, and all the other categories which regulate the operations of the human mind. They are not to be regarded as jural laws, because the necessity which is inherent in them, and the compulsory force of their authority, manifest themselves immediately to the human mind, and they operate in it without their requiring any external compulsion, and in such a way that they even repudiate corporeal coercion as unworthy of their nature.

All the terror of the powerful armament of a great State can add nothing in the way of demonstrative force to the correct thought of a poor man, nor could it strengthen the logical weakness of an erroneous inference. Hence the State can claim no authority here, nor exercise any rightful control.

4. In all human Right there is an external element that is knowable, real, and corporeal, upon which the external power of the State is able to operate, and which, for this reason also, it can protect. There is *no Right without form*.—In all human Right, however, there is also an ideal, moral, and spiritual side, which becomes manifest to the human mind as necessary for the living of men with each other, and which determines human society—and especially the State—to express this necessary order as Law, and to protect it as Right, with outward coercive means. There is *no Right without mind*.—It is only what the mind of man recognises as necessary order, corporeally and spiritually, and only what the will of man is able to establish and to protect in a powerful way, that constitutes Right. All Right is therefore a kind of *human Order* which lives in the consciousness of men and receives its power from the will of men. Right is consequently *in men*, and it has no existence and no power outside of men. It is not therefore—as many idealists have imagined—an order which rules *above* and *over* men, such as the stars of heaven, or the blessed gods in the clouds.

Accordingly it is only men who can determine matters of right, enact laws, and, as judges and arbiters, decide disputes about Right, which can only be brought forward by human parties. For it is only men who can have a consciousness of right and a responsible will, without which no rightful action is conceivable.—It is possible on grounds of justice, technically to ascribe to the lower animals, and even to lifeless things, under certain circumstances, a right or particular rights. Thus it is possible to secure certain legal titles or to impose certain legal duties upon an estate. The ancient Germans were wont to ascribe definite rights to the bull, the boar, and the hound. The bears in Berne and the pigeons in Venice have, as it is said, an estate of their own. The idea that the classes of society are distinguished by their special forms of right, so that the lordly manor, the nobleman's estate, and the farm or the croft have peculiar rights and burdens, does not appear unintelligible to our present sentiment of right. Even to the acute minds of the Roman Jurists there was nothing strange in the notion that one piece of ground should exercise dominion over another; and in the lifeless inheritance which was not yet entered upon by the heirs, they supposed the existence of a jural being. The Romans and the Germans found still less hesitation in ascribing rights to their gods and saints; for they ascribed to them, as to men, in equal or higher measure, consciousness and will.

But all these artificial extensions of the conception of Right beyond men have only meaning and efficacy under the supposi-

tion that men regulate and protect this right, and that they act for the lower animals and for the parts of the land as well as for their gods and saints. If men are thought away from the connection, then all these rights, as referring to what is not human, also fall of necessity away. Thus it is that they can only exist in men and through men.

5. Man is a *natural subject of Right*, because he has received in his constitution the sense of right, and because he possesses by nature the capacity for forming, protecting, having, and enjoying rights.—Man is not merely a being with a *capability of Right*, and, as such, a *natural Person* only in capability. He is *in reality* a Person, that is, he is a being *endowed with Right* by nature.—There is *no Right without a person* to whom it belongs and who is entitled to make it valid. There is *no Person without Right*.

6. The original natural Right of every person is the right to his or her *Existence*. The order of right has to furnish the person with protection against violent attacks upon his or her life, and upon the integrity of the body. It provides also for the care and guardianship of helpless children, and for the necessities of the poor who are in need of support.

7. The necessary consequence of this first original Right of Existence is the second *original Right of Development*. The existence of the individual man is unfolded in his life, that is, in his development. The right to be, which belongs by nature to a person as a living, rightful being, and which is carried out by the State in its consequences, draws after it the right to live, that is, the Right of Development. The protection of existence without the protection of the unfolding of this existence as the life of the individual, would be incomplete and insufficient. It is in the *second* original right that the *first* actually finds its fulfilment and its full operation. The Right of Existence authenticates itself in the Right of Development.

8. The common development of men is determined either by the natural development of the periods of life as regulated by nature, or it is determined by men, and it rests upon the practice of families, of the tradition and perfectioning of the nation, and the arrangements of the State. We call the second mode of determination the “development of Culture.” The natural development is protected by Nature herself, and only requires the help of Right in subordinate applications. The cultural development, on the other hand, is essentially relegated to the protection of Right.

As regards the *natural* Development, the regulation of it by right includes the laws which protect children and the young with respect to their healthy growth, and which provide against the exhaustion of their powers in factories. It also includes the rules required to protect grown-up workmen against excessive demands on the part of their employers, and to secure them necessary relaxation, rest, and sleep, and free leisure for the enjoyment of their life.

As regards the *cultural* Development, the protection of Right exhibits itself in the political Institutions established for education and instruction, and more especially in the introduction of the universal duty of educating the children in National Schools, in legal regulations regarding special training in Technical Institutions, and in the relative arrangements carried out in the higher Scientific Schools for officials, physicians, teachers, and clergymen.

If these relations of Right, which are extremely important for the individuals as well as for the whole people, are as yet but little considered in the theoretical Systems of Law, and at the most only receive occasional mention, one reason of this defect is to be found in the fact that the universal principle of the Right of Development is not yet understood.

9. A Law which misapprehends and disturbs the natural development of the Person is a malformation of Right; it is a spurious right. A Law which denies the development of the Person, and hinders it so far as it can, notwithstanding the formal authority of right to which it appeals, is really a *Wrong*.—Examples of such spurious rights are presented in the continuance of the paternal power over the grown-up son in the old Roman Law, the guardianship maintained over unmarried women of mature years in the old Roman and old German systems, and partly, too, the legal limitation of women in regard to the calling in life for which they are qualified even according to modern rights, but which in our days is being gradually set aside.—Examples of the latter kind of pernicious wrongs are given in all forms of slavery, all serfdom, all indissoluble monastic vows, all astringency to the soil; for all these so-called rights negative the free development of the person, and check as much as they can his self-determination and his free action.

10. All the Rights of Liberty or Freedom—which are so dear to the humanity of this age that for their acquisition and assertion men risk everything, including the whole existence of the person—are at bottom only applications of the Right of Development.

The modern State, in freeing labour from the earlier restraints of the guild laws, and in introducing in principle freedom of trade, has recognised the Right of Development; for labour is exercise of the personal powers and capacities, and in the choice of a calling and the prosecution of a trade, the economical capability of men is brought into external operation.

The right of every one to confess freely his religious belief, and to worship God according to his own requirements and conscience, as well as the rights of the free expression of opinion and of a free Press, are applications of the Right of Development to the religious and spiritual life of men.

11. Not only individual men, but Peoples, are also persons; for the peoples have a special spirit and character which embraces the multitude of the individual members of the people in unity. They

have a common consciousness of Right, from which the knowledge of right and the practice of right arise. In the State they have produced an organization which is capable of giving single expression to the common rightful will in the Law. It is capable, also, of creating institutions of right, proclaiming rules of right, deciding controversies of right between different persons in a legal way in the courts of justice, and punishing violations of right according to legal principles. This organization is also able to manifest the political will of right in the government and administration, and to give it effect in rightful transactions and affairs. The *People* constitute the highest and most powerful *jural person*. And as the peoples are living beings, they have also a development of their capacities and of their powers. The right of a people to live is the Right of its Development.

12. Laws or contracts which seek to contest and to hinder the development of the people are contrary to the conception and the determination of Right; and hence they are really *wrong*, although in their form they may show the appearance of right. Because Right is the common order of human life, it is not legitimate for it to check the development of the life of the people, which it is called to secure and to serve.

A political constitution which excludes all future change, and consequently all improvement and development, or which connects such change with conditions that are impracticable, is therefore wrong, just as a political compact is wrong which disregards the necessary conditions of the life of a State.

It is the function of Public Right to satisfy the requirement of the life of a people, and to protect its development. It is brought forth through the consciousness of right in the people, it is made actual through the will of the people as the will of the State, and it is defended with the powers of the people as a condition of the life of the people. Hence Public Right is itself a living thing. If it becomes a dead letter, which is expelled from real life like the withered leaves of the forest, it has ceased to be right. It is contrary to nature that the dead should enslave the living, and it is contrary to logic that the condition of life should impede life itself.

13. A right which remains behind the progress of the people, and does not suffice for the development of the people, is a *false right*. Right, as a condition of the life of the people, must continue in harmony with the movement of the popular life, in order that it may continue sound. If it disturbs that movement, the people and the State become, as it were, sick.

Many revolutions, and not a few usurpations, which broke through the traditional law of the constitution, and which pressed by force towards a new formation of Right, are explained by the fact that the traditional constitution did no longer satisfy the advancing development of the People.

14. The *Historical Right* continues to be effective only so long as the living forces and powers that have found realization in it,

and that have attained formal recognition and external authority, continue to operate in the life of the people. When these powers are used up, and lose their force, the jural body which they have taken on for their activity loses all its inner life, and necessarily dies out like a plant whose cellular structure no longer receives nutrition, or like an animal whose breathing has stopped, and the circulation of whose blood has been checked. The mortality of the jural institutions, and of all the rules of law which owe their origin to the changeable wants of time and the changeable views of an age, is a consequence of the development and of the mortality of men and peoples. Dynasties and heads of nations are mortal; classes and their rights are transitory. From age to age the old ruling classes in the people lose their authority, perhaps in consequence of the misuse of power, perhaps in consequence of supervening weakness. Then with the vitality of the dynasties, ranks, and classes, and their capability of working, their right also inevitably perishes, as it was only the expression of that vitality and the exercise of that capability.

During the youth of the peoples, their feelings of right and their legal requirements are different from what they are in their maturer age. A people in the process of rapid growth has other interests than a people which has attained its greatest range, or has already passed beyond the height of its power. And accordingly the forms of the constitution must also be different at the different stages in the life of nations.

15. Even more than in the perishing of antiquated right does the Right of Development authenticate itself in the *birth of new Right conformable to the time*. When the forces resting hitherto concealed in the peoples are awakened by the light of time, and begin to stir and become visible, when they unfold their power in the popular life and attain to permanent reality, it is then that new Right is born from the new relations.

The living people, because it has a human subsistence, has the right to have its existence recognised by the other peoples. So every people has also a right to the condition that no impediments be raised, either from within or from without, to its development, in so far as that development is internally necessary and externally in conformity with existing relations. It has the right to regulate for itself the conditions of its life, and to give to itself the constitution which the development of its life requires. It exercises its Right of Development in neither allowing itself to be kept by antiquated historical right from satisfying the requirements of its life, nor in allowing foreign peoples to hinder it in this work, while at the same time it also respects the existence and the development of the other peoples.

The Right of Development within a State thus becomes the Right of *Constitutional Reform* as well as, politically and internationally, the right of carrying on the *National Formative Development of the State*.

THE MEDICAL JURISPRUDENCE OF INEBRIETY.

BY CLARK BELL, ESQ., PRESIDENT OF THE MEDICO-LEGAL
SOCIETY OF NEW YORK.

IN a discussion like that proposed before the Medico-Legal Society, in which the question is to be considered by such able medical men from the medical side or standpoint, it has seemed to me that it would be of interest to both professions, as well as to laymen, to have the inquiry made as to those relations which attach by law to inebriety, as well in the civil and domestic relations of the inebriate, as in regard to crimes committed by persons while acting under the influence of intoxicants or while in a state of intoxication.

What, then, is the present legal status of the question?

I shall briefly state (but have neither opportunity nor space to discuss) what I believe to be the law upon the subject; citing and grouping authorities the civil side first, and the question of criminal responsibility second.

I. CIVIL RELATIONS.—1. *Intoxication* was regarded by the common law, when complete and characterized by unconsciousness, as a species of insanity. Lord Coke's fourth manner of "*non compos mentis*" was, "4. By his own act as a drunkard."

Delirium tremens, which results directly from habits of intoxication, is in law considered to be a form of insanity, and this has been repeatedly held by the courts.

It has always been a well-settled rule of law that no person can make a contract binding upon himself while he is wholly deprived of his reason by intoxication. This would be true as to deeds, wills, all instruments and obligations of every kind. This rule is not changed where the intoxication was not procured by the other party to the contract, but is voluntary on the part of the drunkard.

(a) By the common law, as well as by the New York Statute, a testator must, at the time of the execution of a will, be of "*sound mind and memory*," and it is as requisite to have the presence of a "*disposing memory*" as a "*sound mind*."

(b) By common law and by statute law an intoxicated person is thereby rendered incompetent as a witness. The statute law usually classifies such intoxicated persons as lunatics, and the provisions frequently apply similarly to each, and to both.

(c) In the marriage contract, which in some respects is treated on different grounds from all other contracts, from the necessity of the case and consequences upon consummation, the sound general rule has been, that if the party was so far intoxicated as not to understand the nature and consequences of the act, this would invalidate the contract.

2. The analogy between lunacy and total intoxication, or even habitual drunkenness, is doubtless most marked in the statutes of

the various States regarding the care and custody of the person and estates of lunatics, idiots, and habitual drunkards.

(a) By English law the Lord Chancellor, as the direct representative of the Crown, has always exercised the right of assuming the custody and control of the persons and estates of all those who, by reason of imbecility or want of understanding, are incapable of taking care of themselves. Writs *de lunatico inquirendo* were issued in cases to inquire whether the party was incapable of conducting his affairs on account of habitual drunkenness.

(b) The Supreme Court of every American State would doubtless have the right which the Court of Chancery exercised under the law of England in the absence of any statute law. This must be so in the nature of things in American States; the principle has been exercised and adjudicated on in Kentucky, in Maryland, Illinois, Indiana, and North Carolina.

The Legislatures of the various States have vested this power by statutory enactments in various tribunals,—for example, in New York by the old law in the Chancellor; in New Jersey in the Orphan's Court; in South Carolina equally in the law and equity side of the courts; and now in New York, where the distinction between law and equity has been abolished, in the Supreme Court, which exercises it. It will be observed that in many of the American States the habitual drunkard even is classified and treated under the same provisions, and in the same manner, as the lunatic and the idiot, notably in Pennsylvania, New Jersey, Maryland, Illinois, New York, and many other States. Taking New York as a fair illustration of the principle, it has been held by the courts, that all contracts made by habitual drunkards, who have been so adjudged in proceedings *de lunatico inquirendo*, are actually void. And that the disability of the habitual drunkard continues after the committee has been appointed, even when he is perfectly sober and fully aware of the nature and consequences of his acts. It has also been held that *habitual drunkenness*, being established, it is *prima facie* evidence of the subject's incapacity to manage his affairs.

We may then assume, in considering the medical jurisprudence of inebriety, that the law has always regarded and treated intoxication as a species of mental derangement, and has considered and treated the habitual or other drunkard as entitled to the special care and protection of courts of equity, in all matters relating to his civil rights, his domestic concerns, his ability to make contracts, his intermarrying and disposing of his property by deed, gift, or devise.

The law has gone further, for it has thrown around him its protecting arm and shield, when it is satisfied that he has become so addicted to drink as to seriously interfere with the care of his estate; and the courts have then come in, and taken absolute control of both person and estate of drunkards, in their own interest and for their presumed good.

Medical men should keep in mind the distinction running all through the law between insanity and irresponsibility. The medical view, that irresponsibility should follow where insanity exists, has nowhere been conceded by the law, and this distinction must be borne in mind in the subject here under consideration.

II. CRIMINAL RELATIONS.—This brings us to the second question: The relation of the inebriate to the criminal law for illegal acts, committed while intoxicated, which seems more harsh in its practical effect than the principles which govern him in his civil and social relations to society and the State.

This seeming hardship, however, is due to the capacity of the drunkard, considered objectively, for wrong-doing. In the one case, his position as a civil agent is that of a unit of society merely—one who is, as it were, to be “saved from himself;” in the other case, the criminal aspect of the drunkard, it is the weal of society which is to be conserved and protected.

1. That form of intoxication which results in the total or partial suspension of, or interference with, the normal exercise of brain function, is regarded at law as mental unsoundness, and sometimes amounts to a species of insanity. It has been held at law to be a voluntary madness, caused by the wilful act of the drunkard, and the decisions have been uniform, that where reason has been thus suspended, by the voluntary intoxication of a person otherwise sane, this condition does not relieve him from the consequences of his criminal acts, or, more carefully stating it, from acts committed by him in violation of law while in that state.

(a) There are decisions which go to the length of holding that the law will not consider the degree of intoxication, whether partial, excessive, or complete; and even that if the party was unconscious at the time the act was committed, such condition would not excuse his act; and, in some cases, judges have gone so far as to instruct juries that intoxication is actually an aggravation of the unlawful act rather than an excuse.

But the better rule of law now undoubtedly is, that if the person, at the moment of the commission of the act, was unconscious, and incapable of reflection or memory, from intoxication, he could not be convicted.

There must be motive and intention to constitute crime, and in such a case the accused would be incapable, from intoxication, of acting from motive.

(b) The reasons upon which the rule of law rests may, with great propriety, be considered, and should be carefully studied, before any attempt at criticism is made.

(1) The law assumes that he who, while sane, puts himself voluntarily into a condition in which he knows he cannot control his actions, must take the consequences of his acts, and that his intentions may be inferred.

(2) That he who thus voluntarily places himself in such a position, and is sufficiently sane to conceive the perpetration

of the crime, must be assumed to have contemplated its perpetration.

(3) That as malice in most cases must be shown or established to complete the evidence of crime, it may be inferred, from the nature of the act, how done, the provocation or its absence, and all the circumstances of the case.

2. In cases where the law recognises different degrees of a given crime, and provides that wilful and deliberate intention, malice, and premeditation must be actually proved to convict in the first degree, it is a proper subject of inquiry whether the accused was in a condition of mind to be capable of premeditation.

Sometimes it becomes necessary to inquire whether the act was done in heat of passion, or after mature premeditation and deliberation, in which the actual condition of the accused, and all the circumstances attending his intoxication, would be important as bearing upon the question of previous intent and malice.

(c) The New York Penal Code lays down with precision the provision of law governing the question of responsibility in that State as follows:—

§ 22. *Intoxicated persons.*—No act committed by a person while in a state of intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

(d) Voluntary intoxication, though amounting to a frenzy, has been held not to be a defence when a homicide was committed without provocation.

(e) *Delirium tremens*, however, a condition which is the result of drink, and is remotely due to the voluntary act of the drunkard, has been held to be a defence to acts committed while in the frenzy, similar to the defence of insanity.

(f) It has been held that when inebriety develops into a fixed and well-defined mental disease, this relieves from responsibility in criminal cases, and such cases will be regarded and treated as cases of insanity.

(g) It may now be regarded as a settled rule, that evidence of intoxication is always admissible to explain the conduct and intent of the accused in cases of homicide.

(h) In crimes less than homicide, and especially where the intent is not a necessary element to constitute a degree or phase of the crime, this rule does not apply.

The practical result, however, in such cases, and in those States where the latter provision of the New York Penal Code has not been adopted, is to leave this whole subject to the judges who fix the details of punishment. This is a great public wrong, because each judge acts on his own idea, and one is merciful and another

harsh. If it is placed by law in the breast of the judges, it should be well defined and regulated by statute. Lord MacKenzie well says: "The *discretion* of a judge is the law of tyrants."

3. It will be observed that the law has not yet judicially recognised inebriety as a disease, except in the cases of *delirium tremens* above cited, and hardly even in that case.

It is for publicists, judges, and law makers to consider the claim now made, that science has demonstrated inebriety to be a disease.

If this is conceded, what changes are needed to modify the law, as it at present stands, so as to fully preserve the rights of society, in its relation to the unlawful acts of inebriates, with a proper and just sense of the rights of the inebriate himself.

This contribution is made from the legal standpoint purely, and is designed merely to open this interesting discussion for both professions, to which such names as Dr. Norman Kerr, Dr. T. D. Crothers, Dr. Joseph Parrish, Dr. Charles H. Hughes, Dr. T. L. Wright, Dr. E. C. Mann, and others, will contribute the medical view, a discussion which I hope may arrest the thoughtful attention of the students of the subject throughout the world.—*From Advance Proofs, Medico-Legal Journal, New York.*

MARRIAGE IN THE GERMAN MIDDLE AGES.

BY DR. E. FRIEDBERG, UNIVERSITY OF BERLIN.

IN proceeding to deal with Marriage, and the formal celebration of Marriage, in the German Middle Ages, it is necessary to start with a brief indication of the position of the German women in the Middle Ages generally, as it is only on this basis that the German family and German Marriage can be construed and understood.

As among all natural peoples, we find that among the Germans the women stood in a relation of dependence towards the men. The prevailing right of self-help necessarily established a kind of protection for the weaker sex in the stronger, and thus minors and all others incapable of bearing arms found their representatives in the effective fighting men. It was natural that this guardianship should be united and identified with the Paternal Power, that it should become hereditary in the paternal family down to the last male member, and that it should be ultimately consigned to the man into whose family the wife entered as a spouse.

In this jural framework we have the outline of the position of the German women of antiquity and of the Middle Ages; and from these jural relations we recognise that the position of the German women of those times, which has been so praised—and rightly praised—differed essentially from that which they occupy in our days. The women enjoyed the respect and the considerate

treatment which were believed to be due to a being that was spiritually strong, perhaps spiritually superior, but was corporeally in need of help.—Indeed the German nationality thus presented a visible contrast to the Church, which expressed the Oriental depreciation of woman, and the Old Testament priestly standpoint, in the anxious dread with which they regarded all approach of women to the altar, and all contact of holy vessels and garments with female hands as a sort of desecration. Nevertheless the women did not concentrate the spiritual life of the nation, but the influence of their activity was limited to the little circle of the household, and the personality of the wife was entirely merged in that of the husband. This view showed itself in a very definite external way. It led even in Germany to the practice of the wife following her dead husband into the other world, on the ground that the body, as it were, loses its life and dies out when the head has fallen.

If we now inquire into the character of the paternal or marital power to which the women and wives were subjected, we find that on this point the Germans were little different from the peoples of classical antiquity. They were a wild people, inclined to violence, and addicted to amusement and drinking. War was regarded as an occupation alone worthy of the men; it was only upon the battlefield or in the camp that the man felt himself at his best. Whence then, it may be asked, could the refined forms come which some have desired to attribute to the reverence of our forefathers for women? Where do we find the tender feeling which it is common to transfer from the later conception of love to these times?

The father could expose his child immediately after birth, and he could sell it into slavery. And although the former right was more and more weakened by the influence of Christianity, and at last was branded as a crime, yet Geiler of Kaisersperg, the famous preacher of the Fifteenth Century, could still say: "The father under the distress of hunger may sell his son, and otherwise not; the mother may not sell her son whether she suffer hunger or not."¹ The children, according to the view of those times, formed a capital; and until they grew up, they were regarded as a dead property, which their lord and father was free to dispose of. It was a kind of business calculation which impelled him to rear the well-formed new-born son for use and benefit, and for the glory of the house; and it might occasion him to get rid of a new-born daughter as a joyless, troublesome burden, or it might move him in a time of greater civilisation to give her a training, so that she might become of use, and work in the limited circle of the household.

When we compare the rights of the husband with those of the

¹ "Der vatter in hungersnot mag er den sun verkaufen und sunst nit; die mutter mag den sun nit verkaufen, sie leid hunger oder nicht."

father, we find that they were completely equal and similar. The husband was also entitled to kill, sell, and chastise his wife.—The first two rights of the husband alluded to are certainly found only in the old northern *Sagas*, and even then women of nobler nature preferred death to such trading in human beings; yet traces of it are still recognisable in England, where among the common people the immoral practice is found of a man bringing his wife to the market and selling or exchanging her. Although this practice is seldom used, and arises from ignorance of the law, yet it is believed that the bond of marriage is thus dissolved, and, however erroneous, it is unhappily unpunished.—The husband's right of chastising the wife continued, however, to exist for many centuries in unweakened force, and there are still traces of it in the law-books of our own days.

I may be permitted to enter more closely upon this point, and, even under the danger of destroying an illusion in respect to the German antiquity and Middle Ages, I am nevertheless compelled by historical fidelity to draw attention to certain features which gave a peculiar character to marriage in those times. But on the other hand, I am able, in contrast to this, to refer to the moral excellence which lay from of old at the basis of the German relations of marriage.

“The women should be reared,” said Siegfried of the sword,
 “So that they never speak a single wanton word.”

Thus it is sung in the *Nibelungenlied*; and as a proof that the precepts of the noble giant hero were not mere theory, we have the lamentation of Chriemhilde:

“And so for this he has made my body *black* and *blue*.”

“Throw off your friendliness,” says the Minnesinger Reimar of Zweter, “and seize a big cudgel, and lay it upon her back, always better and better, with all your might, that she may know you as her master, and forget her badness.”—Still later the laws of some of the cities, like one of Hamburg of the year 1497, give exact determinations as to the right of the husband to chastise the wife.

On the other hand, the husband, as at least the moral censors of those times demand, was not to act as a hard-hearted, self-willed tyrant. “Hear this, ye good husbands,”—thus speaks Grieshaber in a sermon,—“Eve was not made out of a foot; that means that you are not to treat your wife disgracefully, nor to throw or stamp her under your feet. Many a one, indeed, does not do this, yet he treats his spouse in everything scantily, and never speaks to her in a friendly way.—Yet neither was Eve made out of the head; this means that the wife ought not to be above her husband. From what then was she made? Lo! she was made out of a side; and by this we ought to observe that the husband should hold his

spouse rightly as himself and as his body. It is right that they should be one body and two souls."—And if we would further hear a voice from the age of the Reformation, it is thus that Bullinger speaks in his little book on the married state: "Is there anything that displeases you, then speak openly and reasonably with your husband, that he may get rid of this or that. If there is reason in him, he will resolve to do it. It is not by the fist that we always and with every one obtain all that we would like to get. On the other hand, however, chastisement has none the less also its time and place."

Having thus looked at the position of women in the Middle Ages, we shall now pass on to the consideration of the formal Conclusion of Marriage as the act which effected the transmission of the paternal rights to the husband.

It will appear at once, from the whole previous description of the situation of women, that there could be no room for a free choice of a husband on her side. The father gave his daughter to the man who appeared to him the most suitable; he betrothed her, and often promised his child at a time when she, even if it had been allowed her, could not have expressed her will.

" The nuptials arranging,
The bride-gifts exchanging,
The young pair unminding,
In marriage close binding,
They strengthen the bond."

So it is said of the holy Elizabeth and Count Louis of Thuringia, and yet she had just entered her fourth year and he his twelfth. How then could there be any question about their choice?

Such early marriages, however,—at least in the older times,—were rather exceptions, and commonly a bridegroom of thirty years led home a wife of the same age. Yet even such a wooer did not carefully inquire as to whether he was sure of the inclination of the maiden of his choice; with cool calculating look, in the manner of our present peasants, he weighed the advantages and disadvantages of the proposed marriage against each other. He sought no love, and he offered none.

He desired a housekeeper for his home, a mistress for his farm, a mother for his race; and in return he gave her protection and peace. In all this, his intellect was essentially active; the heart did not speak to the heart.

It would, however, be foolish to assert that all the marriages of that time were concluded without love; but the love of those days was of a substantial and masculine kind, even on the side of the woman. It was the conscious and sure surrender on her part to the man, with all the submissiveness that the custom and right of the time imperiously demanded from her. But it was just this real side of the contract of marriage which constituted a sum of valuable rights, and these passed from the father or guardian to

the husband; and this necessarily led to an indemnification which the latter had to perform to the former. Henceforth the daughter was no longer to be actively engaged in the household of her parents, nor was she longer to ply the spindle for the benefit of the paternal house; nor from this time had the father any longer the right to dispose of her by sale. All these advantages were now to be enjoyed by the husband, and, in order to acquire them, the wife had to become his own; and thus he had to buy his wife.

Such a mode of wife-purchase, however, which has been made the subject of reproach as a sign of the special barbarism of the Germans in ancient and modern times, can only be ascertained from a few faint survivals of the custom. For although the laws and the chroniclers and poets all agree in mentioning the purchase of the bride, yet the more ideal view had then everywhere arisen, so that it is not the person of the woman herself that is sold and treated of, but only the rights that pertain to the guardian in relation to her. In this sense, the pecuniary advantages which flowed from the guardianship were taxed at certain fixed sums which it was necessary to pay to the guardian; and in this sense we are to understand the phrase which still occurs late in the Middle Ages: "He bought himself a wife."—The purchase of guardianship (*mundkauf*), however, was essential to the conclusion of the marriage, so that for instance among the Alemanni and the Bavarians, the guardian was free to dissolve the marriage again at will where such purchase had not taken place, and he could demand an indemnity, while among others the popular rights stopped with the latter condition.

These were the original forms of the German marriage. Crude and hard as they were, they were not without moral elements, and they were gradually smoothed and polished and transformed by the waves of civilisation.

Attention has already been drawn to the fact that the nature of the paternal and marital power experienced deep changes from the influence of the Church, and the moral habit which was diffused by it. The more this was the case, the less became the extent of the paternal rights, and so much the more did the value of the guardianship diminish. And although it was only after the flood of the popular migrations had settled down, and the streams of the national life had found their calm bed, that the true value of the wife for the peace and prosperity of the household could become rightly known, yet this very knowledge brought immediately and necessarily with it a greater emancipation of the women. We see this result appearing in part when the right of compelling betrothal was taken away from the guardian, and when the laws of the Franks, Saxons, and Lombards all agreed in guaranteeing the independence of the woman. Whoever married his daughter against her will was laid under obligation to make good the harm

which might thereby accrue to her, as if he had caused it himself.

Nevertheless it was a good German custom that the maiden in taking the important step of her betrothal should be guided by the counsel of her parents and friends. Ulrich von Lichtenstein, in his *Book for Women*, says: "Let a maiden who has no parents follow the advice of friends; if she will give herself to a husband, she may truly have to live in disgrace." It is, perhaps, from this point of view that we can explain the heavy punishments with which the abduction and carrying off of women were followed, while yet there was a tendency to see the original form of the conclusion of marriage in this act, and to found the structure of German marriage upon a basis similar to that at Rome, where it arose out of the rape of the Sabine women. If the robber fled with the woman to the protection of a church, then, according to the Friesian law, the judge was to burn the houses which he had entered on his flight, and which had been the scenes of his crime, and he was to break into the church, and draw forth the robber to severe punishment. The woman, too, who consented to the abduction made herself guilty of a wrong act, and was deserving of punishment, according to German law. Nevertheless, in the Middle Ages, abductions were numerous both in life and in romance. The laws, although severe in their terms, were mostly too weak, the power of the man was commonly too great, and the delight in dangers was too widely spread to make it otherwise than that bold chivalrous spirits should prefer such a wooing to the sober commonplace courting of parents and friends.

We may also here note the peculiar practice of the Middle Ages, which showed itself in the princes and lords frequently coming forward as suitors for their courtiers, and doing this under a title of right. If a maiden pleased one of the servants of the prince, or a youth engaged the affection of one of the damsels of the court, the prince sent his marshal to the house, and made him woo the person in question, and this was a wooing that could bear no contradiction and no refusal.

"Listen, ye masters, everywhere,
The king and marshal thus declare,
And this command is what must be :
I here proclaim young A. with D.,
Infeft to-day, betrothed to-morrow,
Wed in a year withouten sorrow."

Thus sounds the verse which the imperial marshal was wont to sing in Frankfort-on-the-Maine before the house of the person wooed for. Down till the sixteenth century we find traces of this obnoxious custom, while a great number of documents gives us the proof of how zealously the cities sought to free themselves from such limiting and disregard of the free personality.

It was a further step in civilisation when it came about that

the sum to be paid for the bride was no longer given to the guardian, but was applied, directly or indirectly, so as to form a provision for the bride herself should she become a widow. At length the meaning of the purchase disappeared more and more, and, instead of it, we find only a symbolical or apparent purchase, of which there are still traces to be found in the traditions and usages of the present day.

The purchase of the right of guardianship thus came to appear only as a symbol; and as among the Franks it took the shape of the payment of a shilling and a penny, the opportunity was also given to the Church to introduce in place of the pieces of money another symbol, which has kept its place till our day as the most suggestive and beautiful symbol of all. This was the *engagement ring*.

The engagement ring was originally a Roman symbol, which it was customary to use from the oldest times at marriages. It was to be worn on the fourth finger, for from it, according to the view of the Romans, there went a vein from the heart, and it was put on the left hand because it was nearest the heart. All this has become a custom consecrated by antiquity, and carried on to our own days, although the science of anatomy has long since shown the erroneousness of the idea underlying it. It may be observed, however, that the Dutch—the most sober-minded people in the world—have commonly no engagement rings.

(To be concluded in next Number.)

RECENT LEGISLATION.

I. FOR SCOTLAND.

THE recently published Statute Book must have taken many people by surprise; not so much by its size, although that is considerable, as by the number and the variety of the enactments it contains. Some imagine that there was practically but one Act passed last session, viz. the Irish Crimes Act; but it by no means occupies the disproportionate room in the volume which its discussion occupied in the debates in the House of Commons.

Having carefully perused this somewhat dry volume, and having reflected upon the long nights of obstruction, we are filled with positive astonishment at the amount of legislation got through by Parliament. We thought Ireland had been blocking the way, but we find that by dint of determination and perseverance valuable reforms have been made in the laws of other parts of the United Kingdom besides Ireland. We are not competent to speak with confidence as to England; but assuredly Scotland has no cause to be dissatisfied with the year's legislation. We are not of those who gauge the prosperity of the country by the number of Acts of

Parliament passed in one session, or by the thickness between the boards which bind them together. We consider "reform" as not necessarily the watchword of true liberalism and advance unless it approves itself by its reasonableness and by its methods. To embody doctrinaire theories in Acts of Parliament may be the ambition of fanatics; to remedy felt evils and to keep in touch with the requirements of the present time is the aim of statesmen. Judged by this standard also, our new Acts will commend themselves to the intelligence of all who do not live merely to see their whims and fads sent out to the world as laws.

There are twelve public Acts which belong exclusively to Scotland, while Scotland is as largely interested as either England or Ireland in those general Acts which concern the whole of the United Kingdom. We propose to deal with those two great classes separately, and of the Acts applying only to Scotland to consider, first, what we may call remedial measures, or measures specially called forth by some peculiar circumstance. These are eight in number, and we begin with the—

Trusts (Scotland) Act 1867 Amendment Act, 1887 (50 and 51 Vict. c. 18).

The purpose of this short two-clauses Act, which met with no opposition in either House, is so well stated in the few words with which the Marquis of Lothian moved the second reading of the Bill in the House of Lords, that they may be quoted at length. "Its object is to enable trustees to grant reductions of rents to tenants of lands under the trust, and let for agricultural and pastoral purposes. Under clause 2 of the Act of 1867 wide powers are given to trustees, but it appears that the extent of those powers is not sufficiently defined to enable trustees to act with safety, and this Bill has been introduced to enable trustees to act for the best interests of the tenants and of the estate committed to their charge. The Bill further provides that the trustees who have already taken action shall not be liable to challenge, or be held responsible for such action to the beneficiaries under the trust."

Crofters' Holdings (Scotland) Act, 1887 (50 and 51 Vict. c. 24).

On the ground that the crofters had had their grievances thoroughly ventilated in Parliament only the previous year, and had then obtained a carefully considered Act, the Government strenuously refused to entertain any amendments (such as those of Mr. Anderson, M.P. for Elgin and Nairn) which had for their object not the amendment but the extension of the provisions of that Act. This Act was passed with the sole object of correcting

one or two slight errors in the previous one, and of preventing its evasion by indirect methods.

The recent case of *Fraser v. Macdonald* (7th Dec. 1886, 14 R. 181) may be said to have been the immediate cause of this amending Act. Two of the principal conditions upon which alone a landlord can now remove his crofter-tenants are—non-payment of rent, and notour bankruptcy. Now the Act of 1886, by sec. 6, sub-sec. 4, provides that when an application has been lodged to have the fair rent for any holding determined, the Commission may, on the application of the crofter, “sist all proceedings for the removal of the crofter in respect of non-payment of rent till the said application is finally determined,” but makes no provision for sisting proceedings taken to recover arrears of rent, which may result, through the sale of his pointed effects, in the bankruptcy, and consequently in the removal, of the crofter. In the case of *Fraser* the Court held (1) that application to the Commissioners to fix rent does not (as pleaded by the appellant) operate as a suspension or sist of all legal proceedings for the recovery of rent, otherwise crofters, having sent in their applications, would desire to have the consideration of them postponed as long as possible; (2) that (in the words of the Lord Justice-Clerk) “the Commissioners have no statutory powers to stay proceedings, or to attach conditions on which they should be stayed,” because “they are not authorized to deal with any such matter;” and (3) that the landlords are not deprived of their common law right to use diligence for the recovery of arrears of rent (which the crofters may be quite able to pay), provided only they do not attempt to remove for the non-payment of such arrears of rent. Lord Rutherford Clark raised the question whether the sale of pointed effects is competent or only diligence in security, and to that question the new Act is an answer. The sale of pointed effects is not made incompetent, still less is pointing itself, and no stay of proceedings necessarily takes place, but statutory authority is now given to the Commissioners to prohibit the sale of any crofter’s effects “upon such terms as to payment of rent or otherwise as they shall think fit . . . if satisfied that such sale would have the effect of defeating the intention of the principal Act.”

Power is also given to the Commissioners to give relief to crofters who shall have paid to holders of bills, granted by them to their landlords for arrears of rent, sums in excess of what the Commissioners may afterwards think they should have been called upon to pay. This provision in its present discretionary, instead of its previously absolute, form is the outcome of an amendment proposed by Mr. J. B. Balfour, accepted unanimously by the House of Commons, rejected with reasons by the House of Lords, and finally adjusted by the Lord Advocate so as to satisfy Mr. Balfour and to remove the objections of the Upper House.

Lunacy Districts (Scotland) Act, 1887 (50 and 51 Vict. c. 39).

The necessity for this Act was unanimously admitted in Parliament, and was most clearly explained by Mr. Asher, who said, "The principle of the Bill was that the Lunacy Board in Scotland should have the power of regulating the lunacy districts in Scotland. They had that power under the Act which constituted the Lunacy Board (1857); but, by what had always been regarded as a mistake in legislation, it was taken away from the Board by the Prisons Act of 1877. Before that Act was passed the Prison Boards had the power to move the Lunacy Board to create lunacy districts, and when, by the Act in question, the Prison Boards were swept away, there was no authority to take their place in this matter, and the Lunacy Board could not take action on its own initiative. The Bill now before the House sought to constitute an authority which should have the power to apply to the Lunacy Board to fix the districts." An animated debate, however, arose out of the fourth clause, which introduces the principle of sec. 59 of the Act of 1857 into this Act. That clause, in the interests of economy, provided that new asylums should not be erected for pauper lunatics until it had been ascertained whether the asylums existing within the district could not house them. The Members for Dundee, in the supposed interests of free trade and open competition, opposed this clause as savouring of protection; but at length, in deference to the almost unanimous opinion of the House, withdrew their opposition.

Act to remove Doubts as to the Appointment of the Sheriff of Lanarkshire, and to confirm the same (50 and 51 Vict. c. 41).

Most people know that this Act was required through the Lord Advocate having failed to notice the requirements of the statute 1 and 2 Vict. c. 119, sec. 2, which enacts that "every person who shall be hereafter appointed to the office of Sheriff-Depute shall be an advocate of three years' standing at least, and shall have been at the time of his appointment in practice before, and in habitual attendance upon, the Court of Session, or acting as a Sheriff-Substitute." Consequently Professor Berry, although daily teaching Scots Law in Glasgow University, and constantly fulfilling the responsible duties of arbiter in important mercantile cases, was not legally qualified for the office of Sheriff-Principal of Lanarkshire, which, from his legal attainments, he was so thoroughly qualified to fill.

Valuation of Lands (Scotland) Amendment Act, 1887 (50 and 51 Vict. c. 51).

The object of this Act may be stated in a single sentence. By sec. 5 of the Act of 1867 (30 and 31 Vict. c. 80) the assessor

of railways and canals is obliged, if requisitioned in a particular way, to specify and assign separately the value of those portions of railways included within the limits of burghs, towns, and populous places in which a general or local Police Act is in force; he may now be required to do the same with regard to the valuations of all waterworks, gasworks, and other undertakings of which he is, or may hereafter be, the assessor.

Secretary for Scotland Act, 1887 (50 and 51 Vict. c. 52).

"The office of the new Secretary," says Mr. W. C. Smith, in his interesting book on this subject, "has been constructed on the principle, not of defining its powers and duties, but of transferring to the new office certain powers and duties which formerly belonged to the Home Office, the Privy Council, the Treasury, and the Local Government Board for England. The powers and duties so transferred were, with one exception, created by statute; and accordingly the enacting sections take the form of a simple reference to the various statutes scheduled to the Act." This amending Act proceeds upon the principle of making over to the Secretary of Scotland "all the powers and duties vested in and imposed on one of Her Majesty's Principal Secretaries of State by any Act of Parliament, law, or custom, so far as such powers and duties relate to Scotland," under exception of the powers and duties connected with the six Acts specified in the schedule. "These Acts have been excepted, because they refer generally to the United Kingdom. . . . Having regard to the due regulation of trade and uniformity of practice, Her Majesty's Government thought it desirable that the Factory and Workshops Act, 1878, the Coal Mines Regulation Act, 1872, and the Explosives Act, 1875, should continue to be administered by the Home Office. In connection with the Cruelty to Animals Act, there are questions relating to vivisection with respect to which the law should be as uniform as possible in all parts of the United Kingdom; and, with regard to the Reformatory and Industrial Schools Acts, the Government at present has in contemplation a Bill dealing with these subjects" (Marquis of Lothian). Mr. Donald Crawford's amendment, that the Secretary for Scotland should advise Her Majesty upon the exercise of the prerogative of mercy in the cases of Scotch criminals, was accepted, and Mr. Robert Wallace's amendment, making it necessary for the Secretary of Scotland to be in the House of Commons, was rejected. Mr. Caldwell's amendment, making him a Secretary of State, was withdrawn upon the suggestion that it was an unusual course to create a principal Secretary of State by an amendment to a Bill of this kind, and upon the understanding that the Bill was not to be considered final, and that this proposal would be more favourably entertained if postponed in the meantime.

Prison Officers' Superannuation (Scotland) Act, 1887 (50 and 51 Vict. c. 60).

The Lord Advocate in introducing this measure said: "The Bill is for a very simple purpose. Before the year 1877 there were a large number of local prisons in Scotland under separate management in different counties, and when these prisons were abolished, arrangements were made for the superannuation of the officers. It has been found highly inconvenient, where two or more local authorities have had to pay a share of the pensions of these officers, that the amounts should be annually collected separately. The object, and the one object of this Bill, is to enable the authorities to commute the amounts of the annual payments they require to make."

Conveyancing (Scotland) Acts 1874 and 1879 Amendment Act, 1887 (50 and 51 Vict. c. 69).

The interest taken in this Act is due principally, to use a somewhat Irish expression, to what is not there. Its clauses other than the first are of minor importance. Its first clause stood second in the Bill, and with the now absent clause, but in a lesser degree, gave importance to the proposed measure. The "implied entry" of the 1874 Act has given much trouble to superiors, vassals, conveyancers, and courts of law alike. These clauses were intended to remedy certain supposed hardships to vassals consequent upon the interpretation put upon the statute of 1874 by the Court of Session and the House of Lords, and that by repealing the case law on one point, and by setting at rest another point not yet formally decided.

It has been authoritatively laid down—(1) that a singular successor, being by virtue of his infestment impliedly entered without the necessity of taking any further steps, cannot, when called upon to pay a composition, offer the heir of the vassal who last paid a casualty (even with such heir's concurrence) and a relief duty instead; and (2) that trustees to whom an estate has been disposed are singular successors, and as such liable to pay composition duty. [See *Ferrier's Trs.* (26th May 1877), 4 R. 738; *Rossmore's Trs.* (23rd Nov. 1877), 5 R. 201; and *Rankin's Trs.*, 6 R. 739 and (27th Feb. 1880) 7 R. (H. L.) 10.] In the last of those cases Lord Curriehill (L. O.) reserved his opinion of the law "as to the liability of trustees for more than relief duty, where they hold the estate without powers of sale, and solely for behoof of the heir of the investiture;" and we understand that recently a case was settled, after a joint-opinion by the present Dean of Faculty and Mr. Henderson Begg, to the effect that in these special circumstances only relief duty could be claimed. Now the first clause of the new Act has

removed this matter from the realm of controversy by enacting that that is so, and that, where trustees truly represent the heir, they shall be liable only for the heir's casualty, who "upon thereafter entering with the superior . . . shall not be liable for any further casualty."

The clause which stood first in the Bill proposed to make it legal for a singular successor to offer the heir as vassal, and a relief duty, if said heir's consent could be obtained. The controversy in the House of Commons turned upon whether the Bill was to be retrospective in the sense of preventing cases being raised or proceeded with for composition casualties which had already emerged, or whether it should only apply to casualties emerging after the commencement of the Act. An amendment giving effect to the latter view was carried. The report of the Faculty of Advocates, which was in favour of the Bill, had suggested a middle course, viz. that no actions should be raised after the date of the commencement of the Act, but saving actions then in process. In the House of Lords the Duke of Argyll and other noble lords, while thoroughly approving of the other clauses of the Bill, were so averse to considering a provision so important as that in clause 1, so far on in the session, when the House was so thin, that the clause was withdrawn for the present. The nut reserved for their lordships' crackers is a double one. First, the right of the superior to a composition was the same before 1874 as it is now; but then it was defeated by an ingenious method no longer competent. Was that device a legitimate legal fiction worthy of the recognition of the Legislature, and which ought to be revived? or was it nothing better than a dodge of which, though not exactly discreditable, the honourable Company of Conveyancers is well rid? Secondly, was this an oversight of the drafters of the 1874 Act, which should be remedied?—was it an oversight at all? Was the legislation of 1874 a compromise by which, if vassals lost the possibility of tendering the heir instead of paying a composition, they got other advantages instead? We observe that the learned Solicitor-General in the House of Commons said, in answer to Sir Charles Dalrymple, "My hon. friend has said that the Act of 1874 was a measure of compromise. I am bound to say that I have not been able to verify that statement, although it has been made before." Probably, after such a statement from so high an authority, the idea that any regular compromise was intended, must be abandoned; although possibly it might be argued that *de facto* the vassal was not altogether a loser by the new law. [See Lord Shand's opinion in *Rossmore's Trs.*, 5 R. pp. 224, 225.] We may add that the Lord President's opinion in that case seems to support the views entertained by the Duke of Argyll personally.

We now come to an Act which stands midway between what

we have called remedial or special and general legislation for Scotland, the—

Public Libraries Consolidation (Scotland) Act, 1887 (50 and 51 Vict. c. 42).

This admittedly “useful and practical measure” consolidates and amends the Public Libraries (Scotland) Acts, 1867 to 1884. There was no immediate inconvenience to be removed, but we are much mistaken if attention was not directed to this matter by Mr. Carnegie’s recent handsome donation to Edinburgh, unfortunately somewhat marred by the questionable taste of the donor in taking advantage of a non-political occasion to deliver political speeches.

Under the new Act it is no longer competent for a burgh of over 3000 householders to adopt the Public Libraries Acts by a meeting of the citizens, however influential, held in a hall, however large. The expense of printing and postage (or delivery) must just be incurred, and voting papers issued, to be returned filled up and signed by the householders.

The three remaining Scotch Acts owe their existence to no special circumstances. The first is of prime importance, the second is only a stop-gap, and the third is a step in the right direction towards improving the education of the “masses” by the establishment of new “classes.” They are the—

Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35).

This is the most important Act of the year for Scotland, and will increase, if that be possible, the high reputation its framer, the Lord Advocate, bears as one of our greatest criminal lawyers. Any comment, however, upon it is rendered quite unnecessary by Mr. Norman Macdonald’s *Manual*, recently reviewed in this journal, which fully explains its purposes and effects.

Public Houses’ Hours of Closing (Scotland) Act, 1887 (50 and 51 Vict. c. 38).

This is one of the few Acts which do not grace the Statute Book. We feel inclined to call it, with Lord Bramwell, although on somewhat different grounds, “a peddling piece of legislation.” Without pronouncing positively on the vexed question of Local Option, we think the House of Lords handled this Act in a somewhat tinkering fashion. They should either have insisted upon putting off consideration of this matter until a complete measure dealing with Local Government had been produced, or they should have allowed the Bill, which received the almost unanimous support of the Scotch members, to pass as it came from the Lower House. It would have been, at the worst, a comparatively harmless experiment, which could have been repealed upon proving a

failure. Put shortly, the Bill (a private one) when it left the Commons settled 10 P.M. instead of 11 P.M. as the hour of closing public houses all over Scotland. The Act, amended by the Lords, provides that eleven o'clock shall remain the hour of closing for towns of 50,000 inhabitants, viz. Edinburgh, Glasgow (including its nine suburbs), Greenock, Leith, Aberdeen, Dundee, and Paisley, and that in other places "the licensing authority" is to fix the hour, which must be not earlier than ten and not later than eleven o'clock. This Act came into operation on the first day of this year.

Technical Schools (Scotland) Act, 1887 (50 and 51 Vict. c. 64).

This Act should please Mr. Punch. It authorizes school boards to provide schools, or departments in schools, for technical instruction, which is defined as "instruction in subjects approved by the Scotch Educational Department, and in the branches of Science and Art with respect to which grants are for the time being made by the Department of Science and Art, or in any other subject which may for the time being be sanctioned by that Department." It is to come into effect after the ensuing triennial election of school boards.

INTERNATIONAL LAW IN 1887.

THE MEETING OF THE INSTITUTE AT HEIDELBERG.

"THE Institute of International Law is an association exclusively scientific and without official character.—Its object is to further the progress of International Law: 1st, In labouring to formulate the general principles of the science in such a way as to respond to the juridical consciousness of the civilised world; 2nd, In giving its aid to all serious attempts in the direction of gradual and progressive codification of International Law; 3rd, In pursuing the official consecration of the principles which shall have been recognised as being in harmony with the wants of modern society; 4th, In contributing within the limits of its competency to the maintenance of peace or to the observation of the laws of war; 5th, In examining the difficulties which may have arisen in the interpretation or application of the law, and in emitting, as may be required, juridical opinions relevantly called forth in doubtful or controverted cases; 6th, In co-operating by publications, by public teaching, and by all other means, to bring about the triumph of the principles of justice and humanity which ought to regulate the relations of the peoples to each other."

This first Article of the Statutes of the Institute of International Law presents at once the animating motive of the Association, and the practical ideal which it has been faithfully

working out since its foundation at Ghent in 1873. The nobleness and humanity of its purpose, and its earnest and practical methods, are now universally recognised. Its sixty Members and forty Associates embody and represent all that is best in the scientific spirit of International Law from St. Petersburg, Stockholm, Berlin, and Paris, to Washington, Buenos Ayres, Calcutta, and Peking. The Institute practically forms the focus of the scattered rays of International Right, and its moral force, as an expression of the juridical conscience of the civilised world through its most competent and enlightened representatives, has been increasingly felt and acknowledged by the practical authentications of all civilised Governments. It would be interesting, and it might be instructive, at this stage, to attempt to sketch the history of the scientific and practical progress of the Institute during the past fourteen years; but we may presume that the chief facts in its movement are already known to our readers, and we shall confine the present paper to a short account of the meeting and work of the Institute at Heidelberg in September last.

The session of the Institute at Heidelberg was the eleventh in order,¹ and it not only maintained the high reputation of the Institute by the character of its meetings and discussions, but it has definitely marked the progress of the cause of International Law by its determination of important current questions and by bringing new problems into the arena of discussion. It opened under favourable auspices, and it was well attended. The famous Quincentenary of the University had just been celebrated with rare magnificence and pomp, and had animated the classical spirit of this celebrated seat of scientific jurisprudence with the freshened memory of the intellectual achievements of five hundred years. The members of the Institute met on the 5th of September in the principal Hall of the University—the *Aula* of the old *Ruperto-Carolina*—and continued in session till the 10th. M. Balmerincq, formerly Professor of Public and International Law at Dorpat, and now at Heidelberg, one of the founders of the Institute and one of its most active members, was elected President in succession to M. Rolin-Jacquemyns; and Baron Neumann and Mr. Westlake, Q.C. of London, were elected Vice-Presidents. Four Associates were raised to full membership, and seven new names were added to the Associates. At the first public meeting M. Rivier, the General Secretary, read the statutory report, giving a summary of the work of the Institute during the past two years, and indicating the position of the leading questions in the order of the day. In doing so, he touched gracefully upon the glorious reminiscences of the

¹ The previous ten sessions have been held respectively at Ghent (1873), Geneva (1874), the Hague (1875), Zurich (1877), Paris (1878), Brussels (1879), Oxford (1880), Turin (1882), Munich (1883), and again at Brussels (1885). Besides these general sessions, special meetings were held at Heidelberg in 1880 and at Wiesbaden in 1881. There was no meeting in 1886, the proposal to hold a session at Stockholm having fallen through.

University of Heidelberg in the department of International Law, and the distinction of its teachers in that science. The University of Heidelberg was the first to possess a chair of the *Law of Nature and of Nations*, and its first occupant was Samuel Pufendorf. Henri Cocceji and Jean Wolfgang Textor, the ancestor of Goethe, were also occupants of this chair. Zacchariæ, during a long professorship in the beginning of this century, expounded the Right of Nations according to the philosophy of Kant; and Hegel, in the chair of Philosophy, from 1816 to 1818 matured his system, and applied its principles to jurisprudence in his *Outlines of the Philosophy of Law*, which were published in 1817. Robert Mohl, four years after the death of Zacchariæ, took up his work, and carried it on with vast and fertile erudition. His successor, from 1861 till his death on the 21st October 1881, was Jean Gaspard Bluntschli, the distinguished Professor of Public and International Law, one of the master spirits of his age, a chief promoter and ornament of the Institute of International Law, a man equally beloved and honoured by all who knew him for his humane and large and generous soul. The spirit of Bluntschli seems to be still animating the very thought and life of the Institute, and it was a graceful and touching tribute to his worth and influence when, on the afternoon of the closing day of their meetings, the members went in a body to visit the cemetery of Heidelberg, where his ashes repose, and laid a floral crown upon his tomb, as an act of pious homage to the memory of one whom they so greatly revered. Among the other external incidents of the meeting, it may be merely mentioned in passing, that the Grand Duke of Baden paid due honour to the representatives of the Institute, and graced the meeting of the 7th September by his presence. The English representatives present were Mr. Westlake, Q.C., Professor Holland, and Mr. W. E. Hall. The venerable Mr. Dudley Field, Legislator of the State of New York, came from America, at the great age of 82, to take part in the Heidelberg session; and it was an appropriate and honourable recognition of his long and faithful work in their department, when the Institute bestowed upon him the title of honorary member on the occasion.

Our space will only allow the briefest summary of the deliberations and results of the Heidelberg session, but we shall attempt to indicate the position of the leading questions. In doing so, we shall follow the summary given in the *Revue de Droit International* by M. E. Rolin, the Joint-Secretary. On account of the expansion of the matter under discussion, it was proposed to divide the Institute into two sections, one for Private International Law and the other for Public International Law, so that they might meet simultaneously, and thus overtake the material with greater distinctness and in greater detail. This proposal was not carried through at Heidelberg, but as, with the growing demands and the limitation of time under which the Institute works, it is certain

to be ultimately adopted, we shall follow the arrangement of M. Rolin, which proceeds upon it; and on this line we begin with the old questions which came up again for deliberation, and advance to such as took form for the first time. The importance, scientific and practical, of the subjects under discussion, will be too evident to require to be dwelt upon.

A. OLD QUESTIONS.

I. *The Conflict of Civil Laws in the matter of Marriage and Divorce.*—The important question of the international regulation of the relations of Marriage and Divorce—including the form of the celebration of marriage, the conditions of the validity of marriage, and its effects on the civil status of the parties concerned, as well as nullity and divorce—has been under continuous discussion since it was raised at Geneva in 1874. It has been a subject of careful, animated, and varied deliberation. Three sets of proposed articles had been brought forward: 1. A project by MM. Arntz and Westlake in 1883; 2. A project by Von Bar and M. Brusa in 1885; 3. One by M. König, also in 1885. These proposals, and the consequent deliberations, have now been practically completed at Heidelberg. Although the meeting has not elaborated a scheme in a final form, it has fixed certain essential points which will constitute the basis of the scheme, which has now to be formulated by a committee appointed for the purpose. The resolutions voted deal with matters brought forward by the proposals above referred to, but do not yet determine the law which ought to regulate the effects of the marriage, or matrimonial contracts, as regards the persons or goods of the parties. Meanwhile, and until the editing committee have published their formulæ, we shall only give here the three essential rules adopted at Heidelberg regarding the law which ought to regulate *the form of the celebration of marriage*, and also those relating to *divorce*. They are as follows:—“1. *Of the law which regulates the celebration of the marriage.*—1st. It is *sufficient* in order that a marriage be valid everywhere, that the forms prescribed by the law of the place of the celebration shall have been observed. 2nd. It is *necessary* in order that a marriage be valid everywhere, that the forms prescribed by the law of the place of the celebration shall have been observed (saving such exceptions as are to be admitted for consular or diplomatic marriages). 3rd. It is desirable to admit under the title of exceptions, and even between Christian countries—the question of ‘*capitulations*’ being reserved—the validity of diplomatic and consular marriages, in those cases in which the two contracting parties belong to the country of the official who discharges the duties of the legation or of the consularship.”—“6. *Of divorce.*—The question of knowing whether a divorce is legally admissible or not, depends on the national

legislation of the married parties.—But when divorce has once been admitted in principle by the national law, the causes which occasion it ought to be those of the law of the place where the action is instituted.—Divorce when thus pronounced by the competent tribunal will be recognised everywhere.

II. *Conflict of Penal Laws: Extradition.*—This subject was thoroughly discussed at Brussels and at Oxford, where, in 1880, twenty-six articles were formulated expressing the principles authenticated by the Institute in reference to Extradition. It was brought up again at Heidelberg in connection with certain amendments on these articles proposed by M. Rolin, and the proposed amendments were referred to a special commission for further consideration.

III. *Law of Maritime Prizes.*—This important topic has engaged the attention of the Institute since its foundation. It was brought into definite form at Geneva by Bluntschli, Laveleye, and Mancini, and articles were brought forward on the subject at Turin and Munich. These articles, with additions, numbering in all 122, have been finally adopted by the meeting at Heidelberg. They contain the principles laid down regarding the material relations involved in the right of Maritime Prizes, and the organization and procedure of Tribunals, national and international, relating to them, as well as matters relating to neutrals, contraband, recapture, etc. We regret that we cannot reproduce the text of these important resolutions in full. At the meeting of the 8th September the Institute resolved that the *project as to the regulation of Maritime Prizes* should be finally revised and transmitted to the various Governments, with an accompanying letter expressing the wish that the reform to be instituted should become even more complete than what was indicated in the terms of the proposed regulation. The subject has thus passed into the sphere of International Politics.

IV. *International Law as to Railways in Times of War.*—This subject was brought forward at Munich by Professor Von Stein of Vienna, and was discussed at Brussels, but, in the absence of the originator of the scheme, and the practical difficulties it presented, the discussion was adjourned at Heidelberg, with further instructions to the commission to proceed with the examination of the proposals.

B. NEW QUESTIONS.

I. *Conflict of Laws.—Principles common to Civil and Commercial Law.*—This subject was brought forward at Turin in 1882, and has received special attention from the eminent jurists Von Bar of Göttingen, and Goldschmidt of Berlin; but the absence of the latter from the meeting at Heidelberg caused the subject to be deferred for discussion till next session.

II. *Conflict of Laws, and Study of International Unification*

in the Matter of Transport by Railways.—These subjects had been already discussed and determined, and as the principles involved had been accepted at International Conferences, and approved by all the Governments, so that they had already reached the stage of practical application, further discussion of them was found to be unnecessary.

III. *Conflict of Laws, and Unification of Legislation in the Matter of Maritime Law.*—This topic was discussed at Brussels, especially with reference to a proposal of a uniform law in respect to Maritime Assurances. At Heidelberg the commission in charge of it were directed to continue the study of the subject, and to prepare a scheme of resolutions for the next session with reference to maritime "*abordage*."

IV. *Scheme of Organic Regulation for the Navigation of International Rivers.*—This subject has been specially brought forward by Professor de Martens, of St. Petersburg, and has drawn much attention in connection with recent discussion of the cases of the Danube and the Congo. The scheme brought forward by M. de Martens and others was discussed at Heidelberg on the 9th September, and the 40 articles proposed were adopted, with slight modifications. It was agreed to communicate the scheme to the different Governments.

V. *Examination of the Theory of the Conference of Berlin of 1885 regarding the Occupation of Territories.*—The report on this question not having been communicated to the members in time, the further discussion of it was postponed.

VI. *Law of Blockade in Times of Peace.*—The discussion of this question at Heidelberg was one of the most interesting and important that took place. It was conducted in the presence of the Grand Duke of Baden, who appeared to take a keen interest in the debate. Recent events, especially the blockade of the Chinese ports by France in 1885, and that of the coasts of Greece by the Great Powers (with the exception of France) in 1886, have given fresh interest to the question. The Institute voted a declaration on the subject, in which the legitimacy of Pacific Blockade was admitted, but under certain formal restrictions.

VII. *In what Way, and within what Limits, may Governments exercise the Right of Expulsion in the case of Foreigners?*—This subject is entirely new, and, in consequence of the necessity of more careful study of it, it has been adjourned for further consideration till next meeting.

VIII. *History and Literary History of International Law.—Examination of the Means by which a more universal, more expeditious, and more uniform Publication of the Treaties and Conventions between different States might be obtained.*—The prosecution of this subject is manifestly of the utmost importance in the interest of the science of International Law as well as of International practice. Certain propositions have been brought forward regard-

ing it by Professor Von Martitz of Tübingen, and the consideration of the subject has been continued.

IX. *Means to be proposed to the Governments in view of furthering the Knowledge of Foreign Laws, and in particular of securing the Proof of these Laws before the Tribunals.*—This subject was raised at Munich, and discussed at Brussels, where certain resolutions regarding the knowledge of Foreign Laws were adopted. One of these resolutions has been modified at Heidelberg, and the latter part of the subject has been adjourned to another session.

X. *Measures of International Sanitary Police.*—This very important subject was also initiated at Munich in 1883, and it is passing through the first stages of definition and development. It embraces the questions of international hygiene and sanitation, quarantine, etc., and will no doubt receive further attention. Certain conclusions proposed by the reporter of the commission have in the meantime been adopted.

Such is a brief summary of the formal proceedings and results of the meeting of the Institute of International Law at Heidelberg. It will not be denied that the Joint-Secretary is well justified in saying "that the members of the Institute have given evidence of a real activity." And in proof of this he concisely sums up their work in the following terms: "They have brought to a good issue a scheme of regulation with regard to Maritime Prizes, and another with regard to International Rivers, scientific and practical documents of the first order, which will be sent to the Governments. Further, the Institute has laid down fundamental principles in reference to the Conflicts of Laws relative to Marriage and Divorce; it has formulated important declarations relating to the right of Blockade in times of Peace, and to the knowledge of Foreign Laws; and it has examined or discussed the question of Extradition and that of Railways in times of War." Surely this is a creditable record of conscientious and important work, and one upon which—whether we regard the old questions which they have brought to a close, or the new questions upon which their thought is still engaged—we may heartily congratulate the eminent and devoted Members and Associates of the Institute of International Law.

But even this substantial and attractive record does not exhaust the interest of the meeting at Heidelberg. Another question, of vaster moment and of more essential force in its bearing on "the triumph of the principles of justice and humanity" than any of those yet referred to, was brought before the Members at the close of their last sitting. But just because this newest question was so momentous and forcible, its presentation was listened to with a deep sense of responsibility and considerable anxiety as to whether so vast an issue could even come within the province of International Law. It is always so in the approach to ultimate problems

which draw to the utmost upon the intellectual courage and resources of the individual thinker. Accordingly the question alluded to—which has been appropriately formulated as one of the cardinal elements in “the ultimate problem of International Jurisprudence”—has been, by common consent, provisionally withdrawn from the official programme of the Institute. All the more, however, just because it has not been relegated to a special commission, will it be made the subject of individual reflection and literary discussion, until it becomes, as we believe it must become in the immediate future, the burning question of International Law. It is impossible for us even to open the subject here, but we propose to deal with it from this point of view in a subsequent reference.

W. H.

TRIAL BY JURY IN CIVIL CAUSES.

AMONG the many points of difference in the judicial systems of England and Scotland, not the least noteworthy concerns trial by jury in civil causes. In England the whole jury system, civil and criminal, is the result of a long process of natural development, extending over ten centuries and more. In Scotland criminal jury trial probably occupies a similar position, but civil jury trial, as now existing, is out of harmony with the natural process under which the judicial system has been developed. It was introduced after the English pattern with the view of remedying certain inconveniences, which the English jury system seemed to avoid. It was avowedly an experiment which the Act of 1815 (introducing civil jury trial in the Court of Session) sanctioned, and there is all but universal agreement that the experiment has not been altogether successful. The terms of the Fourth Report of the Commissioners appointed in 1868 to inquire into the constitution and jurisdiction of the courts of law in Scotland are of themselves sufficient to justify the question, whether the time has not now come for discontinuing an experiment so tedious and unsatisfactory.

It is unnecessary in discussing this practical question to inquire as to the origin of jury trial. The *Dikastai* of the Greeks and the *Judices* of the Romans may be mentioned as showing that the principle was recognised outside Teutonic nations. But probably in no country does the judicial system rest so absolutely on the principle of trial by jury as in England. From the earliest Saxon times, trial *per pais*, i.e. by the country, has been the distinguishing feature of English procedure, civil and criminal. In fact, in early times, the distinction between civil and criminal hardly existed. Every injury had its money value according to a recognised scale,

and whether the injury were to person or to property, the function of the jury was mainly to fix the responsibility on the proper individual. Even murder was compensated by the *wergild*. Every crime committed by one citizen against another is an injury to an individual, and in addition it is an injury to the State, as guardian of law and order. In early English jurisprudence, retribution for such offences took the form of an award of compensation. There were crimes against the State—chiefly feudal offences—which might be collectively described as treason to a feudal superior, and which were punished with death. But apart from such, the principle of English jurisprudence, in early times, was that every breach of law as between individuals could be atoned for by a money payment to the injured party, along with a *wite* or fine to the king, which was just the money compensation to the injured majesty of the State. When one remembers also the system of frank-pledge, under which the members of the *tithing* were collectively responsible for the misdeeds of any one of their number, one can well understand the propriety and suitability of a jury system in such circumstances. Every *tithing* was a rudimentary jury, although it is in the hundred-gemot, which formed the inquest of the hundred, that the jury system is first properly seen in operation. Every freeholder in the hundred was a judge, or, as we should now say, was on the jury, and it was only in course of time that a devolution of judicial work upon a limited number of the freeholders was adopted. The jury judged on matters within their own knowledge. They were jury and witnesses at once. A curious confirmation of this fact is found in the words of the oath still administered in Scotland to juries in criminal causes: — “You fifteen swear by Almighty God, and as you shall answer to God at the great day of judgment, you will truth say, *and no truth conceal*, in so far as you are to pass on this assize.” Indeed, in times when the duty was devolved on a selected number of jurymen, if the jury was ignorant of the facts, it was the custom to “afforce” it by the addition of more jurors, until there was a sufficient number, competent as to knowledge of the facts, to give a unanimous verdict. “Gif some sayes for ane partie, and some for ane other, others sall be admitted, untill twelve at the least be found of ane mind and concord for either of the parties” (*Reg. Maj.* i. 12. 11, quoted by Ivory, *Forms of Process*). Afterwards the custom arose of adding to the jury witnesses who had no voice in the verdict. The first known instance of this in England occurs in the year 1350, and it was fifty years later before it was made compulsory to have the examination of witnesses conducted in presence of the judge and in open court. Even up to the time of George I. juries might avail themselves of their own private information in deciding a case. Not till then were they required to find their verdict simply on the evidence.

Attention has been called briefly to these details, for the sake of

showing how uniformly and naturally the jury system has developed in England. On this foundation the English judicial system has reared itself, and the rise and development of the distinction between civil and criminal litigation have in no way interfered with the fullest application of the jury principle. In England the criminal jury and the civil jury have one origin and one history. In Scotland the jury has had a widely different history. There seems no doubt that in early times the jury system performed very similar functions in Scotland and in England. Ivory (*Forms of Process*, ii. 268) quotes evidence of the existence of the criminal jury, dating as early as 842 A.D.; and the jury has always been the recognised criminal tribunal. "The trial *per pares*, or by jury, continued to prevail in the whole civil courts of Scotland down to the institution of the old Court of 'the Session.' We find traces of it in the burgh courts; . . . in the guild courts; . . . in the respective courts of the baron, the sheriff, the justiciar, the chalmerslain, etc., in all of which the different classes of suitors or freeholders were bound to give attendance" (Ivory, *Forms of Process*, ii. 272). After the institution of "the Session" in 1425, a check was given to jury trial in civil causes, and the founding of the present Court of Session ultimately proved fatal to that mode of trial, though Lord Kames found that all the processes, civil and criminal, in the Sheriff Court of Orkney, at so late a period as 1604, were tried by juries (*Law Tracts*, No. VII.). The disappearance of jury trial in civil matters must be attributed to various causes. As there was not in Scotland the orderly arrangement into hundreds and shires which we witness in England, the jury system could not have the same local persistency. Then, too, in Scotland's unsettled state the rival feudal barons were the real masters of power, and accordingly local independence in juries was hardly to be expected. Now "the Session" of 1425, and its successor, the Daily Council of 1503, seem to have been instituted as Committees of Parliament, and thus they very naturally arrogated to themselves the powers of Parliament to sit as judges both of law and of fact. The Court of Session of 1532 exercised like powers; and it is noteworthy that up to the present century it was necessary that nine judges should be present in court to form a quorum. Accordingly the discussion on a proof never took place before fewer than nine judges. But while this, taken along with the abolition of the justiciar's civil jurisdiction, partly explains the disuse of jury trial in civil causes, it is further suggested by Ivory (ii. 277), with reference to inferior courts, that as there could now be no appeal from the verdict of an assize (the justiciar's jurisdiction being now only criminal), the litigant who adopted jury trial in an inferior court denied himself the right of appeal to the Court of Session. It would doubtless be an advantage at times to litigants to have cases decided by the Judge Ordinary alone, without the inter-

vention of a jury (which might be composed of jurors who were subject to local and feudal influences), for the aggrieved party could then claim that the Court of Session should review the Judge Ordinary's decision. It has also been suggested that the usurpation of judicial functions by the ecclesiastical courts may have seriously encroached on the jury courts.

Thus, then, the civil jury system fell into desuetude, except in certain cases, which may now be referred to. These were *briefes of tutory*, cognition of the insane, *kenning to the terce*, striking *fiars' prices*, and some cases of division of land. Now it will be noticed in regard to these, that they call for the exercise of the original functions of a jury. They refer to matters likely to be within the cognisance of local men, and peculiarly fit to be determined by their practical skill. Accordingly the system was preserved in Scotland, where the practical skill of practical men was in demand, but it was discarded when it led to the anomaly of requiring untrained minds to judge on intricate points of evidence.

After the institution of the Court of Session, it is clear that our judicial system was developing on different lines from that of England, so far, at least, as civil causes are concerned. In England law was the judge's province,—facts, the jury's. In Scotland it was held that it required a trained mind to balance and sift evidence in order to arrive at the truth of facts, as well as to lay down the law; and accordingly both law and facts were left to the judges. Each system has its own advantages, and it is clear that each must have a different development. But the mistake of the lawyers and statesmen who were responsible for the Act of 1815, lay in applying an English remedy to a Scottish disease. The main defects in the Scottish judicial system at the end of last century were three in number (Swinton's *Considerations*, 1789, p. 81, and Ivory's *Forms of Process*, ii. 278): (1) "The abuse of taking proofs by commission, and reducing them to writing; (2) the great delay unavoidably arising out of the forms of process; (3) the frequent uncertainty of the ground of decision, from there being no sufficient separation in the judgment between the law and the fact." It was seen that in England the jury system obviated these defects: (1) evidence was taken orally before the jury in open court; (2) the verdict of an assize was final, if competently given; (3) it was the province of the jury to determine facts, the judge having sole cognisance of matters of law. Lord Swinton (*Considerations*, pp. 85–93) gives some interesting examples of the comparative celerity with which English and Scottish cases respectively were decided in his time, the comparison being much in favour of the jury system. It cannot be doubted that the introduction of jury trial was a remedy for the defects complained of, but it may be questioned whether it was the appropriate remedy. In the light of subsequent experience, it is obvious that it would have been wiser to

seek the remedy in development and adaptation of the Scottish system, than to engraft on this system a cutting of foreign growth. It is a familiar fact that the shortcomings in Court of Session procedure complained of in 1789 have since been remedied, without calling in the aid of the jury system at all. If jury trial in civil causes in Scotland were abolished to-morrow, there would not be the slightest danger of a revival of the shortcomings or complaints of 1789. Proof before the Lord Ordinary, taken down by a shorthand writer, has done away with the abuses and delays of proof by commission. The expedition with which the Court, under amended forms of process, accomplishes its business, leaves little to be desired, and certainly compares most favourably with the time occupied in English litigation. It is a recognised practice for the judges to give a series of findings, specially distinguishing their conclusions upon matters of fact from their decisions upon points of law. In fact the simplification of our judicial system is in no way due to the introduction of jury trial, but has been effected by a process of internal development.

The purpose for which jury trial in civil causes was experimentally introduced into Scotland having been accomplished by other methods, it might fairly enough be argued that the experiment should cease. But undoubtedly there does exist considerable variety of opinion on the subject, which is reflected in the Fourth Report of the Commissioners of 1868 (issued in 1870). The passage in the report is too long to quote, but it is worth perusal, as giving a judicial estimate of the present position of jury trial in civil causes in Scotland. It is recognised that the institution has not flourished, and that it has not given general satisfaction. The general conclusion of the Commission is, that the system in vogue in 1868 should be allowed to continue, subject to the condition, that where the parties cannot agree as to the mode of trial, this should be left to the discretion of the judge. But it is evident that this conclusion was arrived at solely because no other was possible, in view of the serious differences of opinion which the report discloses. Some members of the Commission (probably the English members) desired to see all questions of pure fact submitted to the arbitrament of a jury. "A considerable minority" expressed the view that trial by jury in civil causes should be abolished, unless it is adopted by consent of both parties, and they assigned reasons, to which reference will afterwards be made. The majority held that in investigating disputed facts, trial by a judge versed in the rules of evidence, and accustomed to weigh conflicting testimony, is the best method of arriving at the truth.

The question of the expediency of jury trial in civil causes must therefore be decided on its own merits, but always with special reference to the peculiarities of the Scotch judicial system. Several advantages are claimed for it. It is maintained, in the first place, that questions of fact are best determined by the

exercise of common-sense, untrammelled by legal proneness to draw fine distinctions. "Skill in law is in no way requisite for trying the truth of facts, and for the discerning of men's intentions by their actions, or for estimating the amount of damages done, or the value of any matter under question. Common-sense and knowledge in the world are more requisite in matters of that kind than skill in law" (Swinton, *Considerations*, p. 63). In effect it is argued that the average mind, accustomed to draw rough and ready working conclusions, is more likely to form a correct judgment on the evidence than a highly trained mind, in which the reflective faculty may be so highly developed as to become too critical in weighing the words of ordinary blunt men. In addition to this it is argued, in the second place, that in the weighing of evidence several heads are better than one, and that "in multitude of counsellors there is wisdom." Undoubtedly there is an element of truth in these considerations. One over-reflective mind may not form so correct an estimate of evidence as a dozen unreflective minds. In those cases especially in which so simple a question of fact as the amount of damages to be awarded is all that falls to be decided, a jury may be a good tribunal. But it is seldom that so simple a question as this is all that a jury has to determine. Lord Swinton, in the work quoted, urges other advantages: *e.g.* under the principle (essential to jury trial) of rotation of jurors, public opinion acts upon them, and makes them impartial—an influence from which in arbitrary times judges are exempt; the jury decides on the oral evidence while it is fresh in their memories; the jury system means (of date 1789) saving in time and expense. There is suggested only one other advantage, put forward by the advocates of jury trial, viz. that the decision is final, if competently given.

(*To be continued.*)

Correspondence.

THE CASUALTY QUESTION.

(*To the Editor of the Journal of Jurisprudence.*)

SIR,—The clause of last year's Conveyancing Bill, providing a form of process for the restoration of the proprietor's right to avoid incurring liability for composition, by getting the heir to give to the superior the security of his undertaking for the obligations of a vassal, was struck out by the House of Lords, on the explanation that, at the late period of the session at which the Bill reached them, they could only pass what was called the "non-contentious" part of the Bill, leaving the rest for future deliberation.

It cannot surely be seriously disputed, by those at least who know the grave practical results of the construction eventually put by the Court on section 4 of the Act of 1874, and who see how dissatisfied the proprietors' party have been with these results ever since the Court so construed it, and who contrast this extreme dissatisfaction with the fact that, in 1874, when the Act passed, there was absolutely no deliberation or discussion in Parliament upon this question; that this construction did not really arise from the design or deliberation of Parliament, but merely from an omission of the draftsmen of the Bill to frame a new form of process to take the place of the old form abolished. It is customary, and indeed unavoidable, for Parliament to trust to draftsmen to frame all the necessary forms of procedure for carrying out fully in practice the general principles which alone can be properly discussed in Parliament, and it is clear that the general equitable principle enacted by sub-section 3 of the above section—that superiors' rights to casualties were not to be affected—was of a kind to be personally understood, and was actually understood by Parliament; while the technical view eventually arrived at, with some difficulty and dissent, by the Courts (*vide* 7 Rettie, H.L., p. 17)—according to which it is held that the Court cannot establish a new form of procedure of this kind, for carrying out such a general equitable principle, though thus laid down by Parliament, where Parliament itself has omitted to provide the new form—is evidently not of a kind to be personally understood, and was certainly not understood by Parliament, but was clearly one of the technical details which they would expect the draftsmen to provide against. It is absurd to suppose that the proprietors' party would have omitted even to raise the question in Parliament, if it had really been understood, seeing it was of such a nature as to give rise to so much dissatisfaction and discussion everywhere when the enactment came to be enforced. The fact that it arose from such an omission, and not from design of Parliament, is also indicated not only by the dissenting minorities in the Court of Session, but even by some of the judges who agreed with the majority (*vide* 7 Rettie, H. L., p. 17). I do not, however, adduce the judges' opinions as necessary, or even peculiarly useful, to prove or support the present contention, because the absence of all deliberation and discussion in Parliament on such a grave and contentious question is conclusive proof, and the best of all proof, that it was no part of their policy. I merely add these judges' opinions to show how near even the judges in the majority—although precluded by technical rules of construction from giving any weight in the question before them to such prior communings—came to declaring to be law what we, who can look at such communings, can show clearly, from the nature of them alone, to have been really in accordance with the policy of Parliament, and

how little ground the opposite party have to rely upon in a question not of law, but of policy.

Seeing, then, that the unjust and impolitic results of this enactment have sprung from a technical omission, and not from deliberation, of Parliament, there ought to be no delay in correcting the omission. The only delay which can reasonably be asked for is delay, *after* such correction, till it can be decided whether any, or what, alteration of the law, as existing before 1874, should be made designedly and deliberately.

But if it be insisted that some narrower limit must be placed to what can be considered the strictly "non-contentious" part of the desired amendments, surely this might be decided, without hesitation, to include (besides the meagre contents of section 1 of last year's Act) a *provision removing the retrospective effect* of the Act of 1874, by which a process, voluntarily taken, and intended merely as an infetment, may now be treated as an entry of a vassal, disregarding the proprietor's right to decline such entry. It is a curious thing that it seems never to have occurred either to the proposers or critics of another Bill on this subject (referred to in a former letter to your *Journal*, vol. xxx., p. 316), that, although it was an absurd thing to propose simply that the implied entry of a singular successor of a defunct vassal should not prevent his heir from being entered by writ of *clare constat*, yet the absurdity could be easily removed by adding a proviso that before, or at the time of, entry of such heir the implied entry of the singular successor should be renounced by him. Provision would have to be made for the revival of implied entry on the decease of the expressly entered vassal till it was again renounced, or till the proprietor should resolve to abide by the implied entry. There would be no difficulty in adjusting the details of such an enactment, and if it were made applicable to all implied entries prior to the date of the Act, it would remove its retrospective operation, which is its most unjust and impolitic feature; and the propriety of this removal is surely "non-contentious," for why should the form in which entry is given make any difference as to the necessity or non-necessity of having the consent of the party receiving it?

Though I do not by any means admit that this would satisfy the just demands of proprietors, or that last year's Bill proposed to give them anything more than exact justice, or that the above would be such a rational form of procedure as was proposed in last year's Bill (which is quite admirable for the way in which it expresses the realities of transactions in plain language, overriding ancient and almost unintelligible fictions), yet I think it desirable to point out what may be decided without hesitation to be in the strictest sense "non-contentious," seeing such a classification of the points at issue has been challenged.

If the retrospective operation of the Act of 1874 were removed

in this way, proprietors would not have nearly so much to complain of. It is true that the abolition of the alternative holding would still deprive them of the saving of expense which that device afforded them for creating and extinguishing by short forms temporary nominal mid-superiorities; but virtually the same device can now be carried out in a somewhat more complicated form, as indicated by a recent decision (*Duke of Hamilton*, 6th July 1883, 10 Rettie 1117). Instead of having two dispositions united into one, as occurred with the alternative holding, we require to write them separately—one disposition conveying *de me* the valuable property, and being recorded immediately, and the other disposition conveying *a me* the nominal mid-superiority retained under the first disposition, but not being recorded immediately, but merely kept as a means of getting the two fees consolidated whenever desired, in the same way as they were formerly virtually consolidated (though the process was, fictitiously, not called consolidation) by entry under the alternative holding. There is no risk in delaying infestment in the nominal mid-superiority, for no creditor or other outsider could make any profit out of it, so no one would attach it in any way. The chief objection is the greater trouble and expense than before 1874, arising from the several deeds now substituted for the disposition with alternative holding, and for the effects which it and procedure under it implied, and from the need of making a search for incumbrances against the heir when the fee is first split. But these are, in most cases, venial matters compared with the injustice and impolicy of the present law, and nothing to what people will suffer rather than submit to what they consider, as I contend, rightly, to be oppression.

It is strange how the superiors' party persist in terming the putting forward of the heir an "evasion" of the superiors' claim, insinuating that it is an unfair evasion, without adducing any arguments to show that it is such, and not an "equitable avoidance" of its incurrence. There are ample grounds for holding it to be an "equitable avoidance," as indicated in former letters to your *Journal* (vol. xxx., pp. 315, 372, 430, and 542), and it was recognised as such both by the present Lord Advocate, who supported last year's Bill, and by the Lord Advocate under the previous Government, who supported a Bill to the same effect. When such a view is recognised by two such opposite authorities, it has passed the stage at which it can be overlooked without even an attempt at disproof. The absurdity of the superiors' party's view consists chiefly in—(1) The fact that when they object to the entry of the heir as vassal, and to allowing the proprietor to hold in a subordinate capacity, they are objecting to the more ancient form of procedure, which existed before superiors were bound to recognise strangers who were in possession; while it would be less unreasonable to complain of the innovation by

which a stranger is empowered to choose to be recognised as vassal. This is a mere option, and they surely cannot object to its not being exercised. (2) The fact that when they object to a subfeu being nominal or temporary (whether this be effected in short form by the alternative holding, or by the other longer forms competent), they are simply objecting to the legal use of the titles they voluntarily granted to the vassals; for it has never been held, or even contended, that a vassal having power to subfeu is restricted by law as to the kinds of subfeu he can grant, whether for valuable reddendo or not, or as to the periods for which they are intended or arranged to exist. This objection to title is all the more inappropriate, because it is generally the vassal, if any one, who has had reason to complain of the objectionable titles, which alone superiors would consent to grant, and which the latter were enabled, through undue and impolitic use of their monopoly of land, to insist on vassals accepting. Even if it were admitted (which there is ample ground in past experience for denying) that the procedure under the Bill of last session would have been generally worse for superiors' interests than that prior to 1874, the superiors' case would still labour under the objection that they were even freer than vassals in making their bargains for feus, and that, if they chose to make part of their consideration consist of irregular payments depending somewhat on the continuance of an objectionable system of conveyancing, they took the risk of any alteration of value incident to any amendments of the system. If any change in the vassals' titles is to be made, it is for the vassals to ask it, and, assuredly, they will not do so till they find how their titles can be improved, not merely without such a grievous loss, but so that some clear benefit will go to themselves and not to the superiors. And (3) the fact that superiors have no proper interest to object that such subfeus are illusory, seeing that so far as regards their own interest, viz. security for the feu obligations, the procedure by such subfeus secures to superiors as good an undertaking for the feu obligations as if they were granted for valuable feu-duties; so that, so far as the superiors' proper interest is concerned, they effect substantial and not illusory results. Beyond this, the vassal alone has a title or proper interest to interfere.

The injustice arising from the Court's construction of the Act of 1874 is accumulating daily, and, though it may be fair enough to ask reasonable time for deliberation on its amendment, yet if this delay becomes great, it will become a fair question whether, besides preventing such injustice in the future, the Legislature should not give vassals some recompense in a question with superiors for the injustice meanwhile being suffered under the Act. Its effect was simply to lay a virtually new impost on vassals in favour of superiors, and it would be as justifiable for vassals to get a new impost laid on superiors for their benefit, as

the reverse. But the proposal that such compositions should be repaid to the vassals, or given credit for, would not amount to this, not even though the superiority may have been sold since 1874, because the injustice, cruelty, and impolicy of the new impost, together with the absence of deliberation in Parliament in 1874 upon such a grave and contentious point, and the subsequent protests against the impost whenever recognised by the Court, were quite sufficient to form a loud warning to purchasers that the effect given to the enactment by the Court was the result of a mere technical omission, and not of the deliberation of Parliament, and was an error of a kind which cries for an ample remedy. The change in 1874 implied a new impost, while the change now contended for, even if it went so far as to give the vassal recompense in some shape for that injustice so far as already suffered, would not, for the reason just stated, really deserve to be called a new impost. It would only become such if vassals attempted to take something additional out of superiors' pockets, as they have attempted to take from the vassals. In every respect there are much stronger equitable considerations against altering the rights of the parties as they had been so long settled till 1874, than against altering them now back to what they were then, there having been no acquiescence, but a continual protest against the alteration made in 1874, ever since it was ascertained.

It is easy to understand why the superiors' party wish rather for an immediate commutation scheme than for, in the first instance, a rectification of the error and consequent injustice of the Act, for they hope that many of the vassals' party might, to obtain an immediate cessation of the severe injury presently being continually inflicted on vassals, give their adhesion to such a scheme, even if it gave superiors greater compensation than they could have procured by agreement with the vassal before 1874. This is making undue use of the results of an error, and, on principle, it should be insisted that the error be first corrected so that future amendments may have a fair starting-point.

In view of the position taken up by the House of Lords in last session of Parliament, parties interested in this question should have two Bills introduced,—one like the Bill of last session, and the other simply removing in some such manner as is now suggested, the retrospective effect of the Act of 1874 in making infeftments rank as entries against the will of the proprietors concerned. This should be made to apply to all infeftments prior to the date of the amending Act, although subsequent to 1874, where prior infeftments, before 1874 (or rather, before the final decision as to its legal construction), as being implied entries, prevented the heir from being entered. If two such Bills were introduced, Parliament would then have the choice either of a thorough and rational measure like last year's Bill, or of sticking

to some extent to the ancient absurd forms, but at least avoiding the great and most substantial hardship involved in the retrospective enactment alluded to.

SIMPLEX.

Reviews.

Legal and other Lyrics. By the late GEORGE OUTRAM. New edition, edited by J. H. STODDART, LL.D. With Illustrations. Blackwood & Sons. 1887.

THIS is a very handsomely got up book, and the illustrations by Messrs. Ralston and Boyd are excellent. No better legal lyrics were ever written than Outram's: the language is idiomatic and racy, and the rhythm smooth and flowing. We ventured last month to find fault with an edition of the *Court of Session Garland*, on the score of its having no notes to enlighten the reader as to the identity of the persons mentioned. In the present volume this point has been attended to, and sufficient information is given about most of the characters alluded to in the verses; there are, however, some omissions which might have been filled up quite easily. The illustrations are on the whole first-rate, and if anything could make "The Annuity" funnier than it is, it is the laughter-provoking cuts which accompany it. But we are shocked to see the Bench in "The Augmentation" composed of four judges wearing sergeants' wigs with coifs and bands! This shows the importance of an artist getting his knowledge at first hand, and not trusting to conventional ideas on a subject. The minister, too, in the same poem is hardly the type of parson which Outram probably had in his eye. But with these exceptions there is nothing but praise to be given to the volume. There are a few additional pieces given, but they are not of much importance.

The Law and Practice under the Companies Acts, 1862 to 1886, and the Life Assurance Acts, 1870 to 1872. By H. BURTON BUCKLEY, Q.C. Fifth edition. London: Stevens & Haynes. 1887.

MR. BUCKLEY'S book on the Law of Companies is so well known that it calls for comparatively little comment. The appearance of new editions in rapid succession testifies to its continued popularity and usefulness. Since the last edition was issued only three Acts have been passed relating to companies—two short ones in 1883 and one in 1886, which provides for the liquidation of companies in Scotland. The cases relative to Building Societies which have been decided within the last few years turn upon

several interesting and important questions: especially may be noted the rights of members to withdraw from such societies. We do not notice any exclusively Scottish case mentioned unless it has been the subject of appeal. More than one case, if we mistake not, has been decided by the Court of Session with reference to the withdrawal of members from Building Societies, and some important information on this subject may be gathered from the Report of the Chief Registrar of Friendly Societies. As the law now stands, according to Mr. Buckley, one can only say that the right of the withdrawing member is that which his contract has given him, and that there is no presumption that his contract for preferential payment is restricted to the life of the society as a going concern. The annotations to the different sections of the Acts are throughout copious and exhaustive. The rules of procedure under the Acts, as issued by order of the Lord Chancellor, are given at the end. For Scottish practitioners a copy of the Act of Sederunt, for regulating procedure in the winding up of Building Societies under the Companies Acts, might have been useful. The Index is very complete, and the whole work shows much care and research.

The Month.

Notaries Public.—The attention of the public has been recently directed by correspondence in our columns to the distinction existing between two classes of the legal profession who both assume the title of “writers.” Properly speaking, the respective designation of these classes should be “law agents” and “notaries public.” The regulations for the admission of law agents, who alone are entitled to practise in the Sheriff Courts, are set forth in the Law Agents Act of 1873 and relative Acts of Sederunt, and formed the subject of a series of articles in the *Glasgow Herald* some time back. Law agents are entitled to be admitted as notaries public on application, and without examination.

The office of notary public is a very ancient one, and the statutory regulations for qualification and admission in Scotland begin with the year 1469, and end with the year 1617. The leading statute is that of 1587, as modified by Acts of Sederunt of 1595 and 1691. An inquiry into the functions of the notaries of Rome would be merely of historical interest, because their duties and those of modern notaries have little similarity. Of the four classes of *tabelliones*, *tabularii*, *scribæ*, and *tabellarii*, the *tabelliones*, who framed the deeds which made private agreements and bargains good in law, approach most nearly to the modern conception of a notary. They were always freemen. The *scribæ* and *tabellarii*

were often slaves, for although Arcadius and Honorius forbade slaves to act as *scribæ*, we find the value of notaries or writers, in the case of the division of the value of a slave who had been bequeathed to several legatees, set down at fifty pieces of gold, which was midway between the value of a common servant and that of a skilled tradesman. In mediæval Europe, the authority to create notaries to see to the due execution, with the solemnities required by law, of necessary deeds, was claimed by the German emperors as successors of Augustus. But the growing power of the popes led to the creation of a new class of Apostolic notaries, who were ecclesiastics authorized by the spiritual head of the traditional Roman Empire to exercise notarial functions in both spiritual and temporal affairs, while the Imperial notaries were gradually excluded, as laymen, from all interference with such law business as the Church claimed for her own.

In the year 1469 King James III. took the appointment of notaries in Scotland into his own hands. The Act 33 of that year bears the title, "Notares suld be maid by the King." The Act provided for the validity of all past Acts of Apostolic or Papal notaries, and of the past and future Acts of Imperial notaries upon their being examined and approved by the King's Highness. The Papal notaries appear to have continued to practise in matters within ecclesiastical jurisdiction, and probably the Act of King James III. was intended only to end their civil duties. The new or royal notaries were to be examined by the Ordinaries and Bishops, "and have certification of them that they are of faith, good fame, science, and lawtie." By Act of James IV. (1503, cap. 64), the Papal notaries were again dealt with. The Bishops and Ordinaries were directed to convene and examine, both as to personal character and knowledge, the notaries within their dioceses, to reject the unworthy, and to send the creditable to the King, who should appoint persons to examine them and make them, if suitable, royal notaries. In the succeeding reign the complaints against the "scribes and notars" seem to have been great, and the Parliament of 1540, considering "that the multitude of them generis ane great confusion," directed that each Sheriff should call before him all the notaries who were laymen, and the Ordinary the "spiritual men," and that none should in future practise as notaries who had not been examined by one or other of these authorities, and had not subscribed his name in their books. Eleven years later Queen Mary, in two Acts, re-enacted her father's provision for the examination of notaries, which had not been put into execution, and provided penalties against the fraudulent acts of notaries. But the notaries seem to have fought shy of examinations with remarkable persistency, for both the sixth and ninth Parliaments of Queen Mary (1555, cap. 43, and 1563, caps. 78 and 79) returned to the charge, and the latter Act vested the power of admission of notaries in the Court

of Session alone. This practically ended the line of Apostolic notaries in Scotland, yet it is properly pointed out in the valuable "Memorandum" by the Council of the Incorporated Society of Law Agents in Scotland, on the office of notary public, that in the parish ministers' still existing power of executing testaments is the last vestige of the clerico-notarial functions. In 1587 King James VI.'s Parliament passed an Act which enumerates as of old the complaints of the frauds and ignorance of notaries, provides that none shall be admitted for five years, and that thereafter they shall be required to have a reasonable understanding of the Latin tongue, and have served seven years with one of the Lords of Session Commissaries, Writers to the Signet, "or sum of the Shireffe, Steward, or Bailie Clerks of the Schire, or Common Clerks of the Head Burrows of this Realme;" the applicants were thereafter to be examined by the Lords of Council or "sum of their awen Clerkes of the Signet quhan they please to call to them for that effect." This is the last Act of Parliament as to the admission of notaries, although an Act of 1617 provides for the inbringing of protocols on the death of notaries. It will be seen how long and eager was the search of the Scotch Parliament for the improvement of the notarial profession. That the office was at once one of great trust and importance, and one liable to be filled by men of no character, whose execution of its duties was a public scandal, may be illustrated from Massinger's reference, many years afterwards, to notaries in the sister kingdom of England. Sir Giles Overreach says to his some-time tool, Marrall,—

"Though the witnesses are dead, your testimony
 Help with an oath or two; and for thy master,
 Thy liberal master, my good honest servant,
 I know thou wilt swear anything to dash
 This cunning slight: besides, I know thou art
A public notary, and such stand in law
 For a dozen witnesses; the deed being drawn, too,
 By thee, my careful Marrall, and delivered
 When thou wert present, will make good my title.
 Wilt thou swear it?"

On 31st December 1595 the Lords of Council made an Act of Sederunt relative to the notaries' examination, which should be by one of their own number, with one of their clerks, and "ane of the said clerks' servants." Applicants were required—(1) to "haif some honest industree and moyane to live by the exercise of that office; (2) to be twenty-five years of age; (3) to be able to write and to frame any deed in Latin or English; (4) to have served five years' apprenticeship with a notary." The Lords in this Act of Sederunt did not regard, it will be seen, with much strictness the provisions of the Act of Parliament which they were administering. Nearly a century passed before another Act of Sederunt was passed, on the 30th July 1691. Then we hear again of the "ignorance and informality of notars." Applicants were to be

required in future to produce certificates of good fame and good breeding, and "exact tryall" was to be made of them by the Lord Ordinary on the Bills for the time, and "any other of the Lords to be appointed by them (being both mett together) of the person's knowledge and qualifications, conform to the Acts of Parliament, before he be admitted nottar." The Act of 1587, as modified by the two Acts of Sederunt, has been more or less followed, but the qualifications as to age and apprenticeship have dropped out. The Court of Session remits the examination of an applicant to the Society of Writers to the Signet, and if they report favourably, an interlocutor is pronounced admitting the notary. The Law Courts Commission of 1871 recommended that the Court of Session "should be empowered to make, and should make, new regulations, not only as to the form of procedure and the mode of ascertaining the character, but also as to the professional qualification of such applicants as are not members of" the Society of Writers to the Signet, Solicitors to the Supreme Court, or Procurators under the Procurators Act, which in 1871 was the principal statute relative to general practitioners. This recommendation has not been given effect to. At the Glasgow meetings of the Incorporated Society of Law Agents in Scotland in 1885 and 1886 the unsatisfactory position of notaries public was considered, and a very careful and elaborate memorandum (to which we are indebted for convenient reference to some of the Acts above mentioned) was prepared by the Council. "It is beyond question," it is observed, "that the education which law agents receive, and the training and the examination to which they are subjected, must necessarily secure much higher qualifications than those possessed by mere notaries. The notary has to undergo no examination in languages or general knowledge, he has to serve no apprenticeship to a notary or agent, he has to attend no classes in the university. [Neither, *en parenthèse*, unfortunately, has a law agent now.] The door of entrance is so wide that bank clerks and accountants with no practical legal training, and members of other professions with even less business knowledge, find ready entrance. This is to be regretted, for a notary, when admitted, is entitled to act as a conveyancer, and to undertake all the most lucrative work of a law agent. The public cannot distinguish between a law agent and a notary, and the latter is quite as likely to secure clients as his more fully equipped brother. The evils resulting from such a condition of things are too patent to require detailed description." On 15th March 1887 the Incorporated Society presented a memorial to the Court of Session, suggesting that their Lordships should remit applicants for admission as notaries, not to the present examinations, but to the examiners under the Law Agents Act of 1873, to be examined on all subjects on which law agents are examined, save in "forms of process" and Court procedure. The memorialists expressed

the opinion, but did not press, that applicants should require to serve an apprenticeship and attend law classes in the university. This memorandum had the approval of the Faculties and law societies of Glasgow, Dundee, Perthshire, Banffshire, Airdrie, Ayr, Dumbartonshire, Dumfriesshire, Elginshire, Greenock, Hamilton, Linlithgow, and Stirling. The memorial was, it is understood, remitted to a committee of the judges, and the Society of Writers to the Signet were permitted to lodge a statement. That Society protested against any alteration of the present system. The practical effect of the Incorporated Law Society's action is seen, however, in the W.S. Society's intimation that they have resolved to raise the standard of the notaries' examination, and make it identical with that to which their own entrants are subjected (it has to be kept in view that Writers to the Signet do not undergo the law agents' examination, but a special examination conducted by their own Society). At this stage the consideration of the qualification of notaries necessarily ends for the present, as the Court of Session have not indicated that they intend to remove the notaries' examination from the authority of the W.S. Society. But it is not likely that the question of notaries and law agents will be allowed to rest, and probably the next Bill dealing with the status and education of the legal profession will not fail to provide for an alteration of the anomalous position of notaries. The office of notary public is an ancient one, but its survival separate from the office of law agent, which the law now regards as the usual and proper designation of a practising solicitor, is an anachronism. That the W.S. Society has raised the standard of examination to that required from its own candidates rather emphasizes this than not, since if in the Society's opinion notaries require a severer test than that hitherto demanded, there is no apparent reason why notaries should not be merged in the usual professional ranks—i.e. that none but those having the qualifications of law agents should be admissible as notaries. No doubt the notaries will say something for themselves once again, for although an old writer on Roman law says, "Notaries are as a pyot or parrot caged in their master's lodgings, which speak without knowing what they say," this cannot in justice be said of the notaries of the present day.

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Suggested Medical and Chemical Assessors Act, 1888.—This measure is borrowed partly from the resolutions of an American medico-legal society, and from the Admiralty practice in England.

Be it enacted, etc., as follows:—

1. This Act may be cited as the Medical and Chemical Assessors Act, 1888.

2. In the interpretation, and for the purposes, of this Act, the following terms shall have the respective meanings hereinafter

assigned to them: that is to say, "medico-legal issue" shall mean any issue arising upon the trial of any civil cause or criminal prosecution for the determination of which the opinion of medical or chemical experts is necessary. "Judge" shall mean any person or persons, invested by law with judicial authority, before whom, in the lawful exercise of such authority, any medico-legal issue arises. "Registrar" shall include any person who acts in the capacity of a registrar to any judge, as hereinbefore defined.

3. The provisions of this Act shall extend to the United Kingdom of Great Britain and Ireland.

4. This Act shall commence and take effect from and after the first day of January 1889.

5. Upon the commencement of this Act, the Lord Chancellor of England, the Lord President of Scotland, and the Lord Chancellor of Ireland shall proceed forthwith to appoint duly qualified persons to act as medical and chemical assessors within their respective jurisdictions, as follows: the Lord Chancellor of England shall appoint twenty-four medical and twenty-four chemical assessors; the Lord President of Scotland and the Lord Chancellor of Ireland shall each appoint twelve medical and twelve chemical assessors.

6. Every assessor so appointed shall receive official notice of his appointment, and every such appointment shall be for a period of three years from and after the date of such notice.

7. At any time before, or during, the trial of any civil cause or criminal prosecution, the judge may direct the registrar to summon not less than three medical or chemical experts to assist him in the determination of any medico-legal issue arising therein, in the manner hereinafter provided. Every assessor so summoned shall be bound to attend and assist the judge as aforesaid, shall receive for such attendance such fee, not exceeding five guineas a day, with an additional allowance when necessary for travelling and incidental expenses, as the judge shall fix at the trial; and for every wilful disobedience to such summons shall be liable, at the discretion of the judge, to a penalty not exceeding five pounds. The fee and allowance aforesaid shall be payable out of the county rates.

8. It shall be the duty of every assessor, summoned and attending as aforesaid at any trial, to answer questions and express in open court his opinion with reference to any medico-legal issue that may have arisen. But the judge or—in cases tried with a jury—the jury shall not be bound to accept the opinion of any one or of a majority of the assessors, unless he or they concurs or concur in it.

9. Nothing in this Act contained shall affect or in any way prejudice the right of any party to any civil cause or criminal prosecution to bring independent medical or chemical expert evidence as heretofore.

Prizes for Essays on Medico-Legal Subjects.—The Medico-Legal Society of New York announces the following prizes for original essays on any subject within the domain of medical jurisprudence or forensic medicine:—

1. For the best essay—one hundred dollars, to be known as the Elliott F. Shepard Prize.

2. For the second best essay—seventy-five dollars.

3. For the third best essay—fifty dollars.

The prizes to be awarded by a commission, to be named by the President of the society, which will be hereafter announced.

Competition will be limited to active, honorary, and corresponding members of the society at the time the award is made.

It is intended to make these prizes open to all students of forensic medicine throughout the world, as all competitors may apply for membership in the society, which now has active members in most of the American States, in Canada, and in many foreign countries.

All details of the award will be determined by the Executive Committee of the Medico-Legal Society of New York.

The papers must be sent to the President of the Medico-Legal Society of New York on or before April 1, 1888, or deposited in the post office where the competitor resides on or before that day.

The name of the author of any paper will not be communicated to the Committee awarding the prizes.

All persons desiring to compete for these prizes will please forward their names and addresses to the President or Secretary of the Medico-Legal Society of New York.

In case the essay is written in a foreign tongue, it should be accompanied by a translation into the English language.

It is hoped that all our members, whether active, honorary, or corresponding, will take an interest in this effort to stimulate scientific inquiry and research in questions relating to medical jurisprudence.

Scientific societies in all countries are invited to lay this announcement before their members, and the co-operation of the legal, medical, and public press is respectfully solicited in bringing the subject to public attention.

CLARK BELL, *President*,

57 Broadway, N. Y.

ALBERT BACH, *Secretary*,

140 Nassau St., N. Y.

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THE case of *Lamond v. Stewart & Bisset*, Nov. 15, 1887 (Second Division), raises a curious point under the law of bankruptcy. It has been decided that cash payments made by an insolvent debtor to his creditor are effectual even when both parties are aware of the fact of insolvency. But in this case the debtor was not only

insolvent,—a petition for cessio had been presented against him, and he had been ordained to lodge a state of his affairs by a certain date. Upon the day previous to that date he sold off his stock, and made a cash payment to his creditors, who received it although aware of the dependence of the *cessio* process. In an action subsequently brought at the instance of the bankrupt's trustee against him, the Court have held that the creditor must refund the cash. The Court seem to have gone upon the broad principle of equity. Lord Young was unable to say that this transaction between the debtor and his creditors was illegal, but he thought it improper—a somewhat singular distinction. In the interlocutor pronounced the finding was that the said payment was improperly made.

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FROM Elgin comes a curious quarrel about a seat in the parish church. Two parties claimed the pew. The pursuer was the heir-at-law of a party who had bought it for £15, and obtained a disposition and assignation to it. But the defender was the owner of a property of which it was contended that this pew was a part and pertinent. The question in dispute formed the subject of an elaborate judgment by the Lord President, who held that the parish of Elgin, having been dealt with as one entirely landward in the matter of the allocation of the pews, it was impossible to detach a pew from the heritable property to which it belonged. Accordingly the disposition founded upon by the pursuer was treated as good for nothing, and the defender triumphed (*Stephen v. Anderson*, Nov. 18, 1887).

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WHEN does an action commence? This is often an important question when statutory limitations have been imposed upon the time within which it must be raised. In *Alston v. Macdougall*, Nov. 18, 1887, the First Division have held—(1) that the mere signeting of the summons does not give birth to the action; but (2) that the citation of a defender does bring it into existence; and that when the cause of an action had arisen on 3rd January, and the defender was cited by a registered letter posted on 3rd March following, the action had been properly raised within two months. Lord Fraser had held that the period must date from the day upon which the defender could receive his citation.

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IT is not often that the Justiciary Court is called upon to consider the question of private prosecution. The fact that, while any person who thinks that he has grounds for criminal proceedings against another is entitled to drag the Lord Advocate before that Court, and compel him to give reasons for not prosecuting, hardly anybody ever does so, points to the general

satisfaction which the Crown authorities give to the community. Last October, however, a certain Mr. Robertson applied for criminal letters to enable him to prosecute for perjury an inspector of police. The applicant, it seems, had been kept out of the Glasgow Circuit Court-room by the inspector, who had subsequently sworn that the room was full, which Robertson maintained was a falsehood. The Lord Advocate had apparently declined to concur in a prosecution, and certainly the case did not seem a promising one for a conviction. Nevertheless that high official had to appear, and state his reason for not giving his concurrence. The Court were clearly of opinion that it was only in exceptional circumstances that they could interfere and control the action of the public prosecutor. The Lord Justice-Clerk, in giving judgment, had to go back for a precedent fifteen years, when a well-known and unwearied litigant had made a similar application. The decision in *Robertson* merely gives effect to the conclusion arrived at in the earlier case. No private prosecutor can act alone, the Lord Advocate is not bound to assist, and the Court must compel him to do so unless very good reason has been shown why a prosecution is desirable in the interests of justice.

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THE Lord Justice-Clerk and Lord Young have in two recent cases applied a very literal construction indeed to statutes. These cases are *Hood v. Malcolm* and *Osborne v. Anderson*, decided upon the same day, Nov. 3, 1887. *Hood's* case was brought under the Weights and Measures Act of 1878. Under that statute a penalty is, in the first place, imposed upon any one using for trade purposes false weights and measures; and it is further provided, that if a person is found in possession of such weights and measures, he shall be deemed to have them for trade purposes, "until the contrary is proved." Now, to the ordinary lay mind it seems natural to conclude from these provisions that the burden of proof is thrown upon the accused, when found in possession of the defective weights or measures. The prosecutor can hardly be expected to prove the accused's case. Nor is it a hardship to compel the accused to explain how articles which the law condemns came to be found upon his premises. This, in some cases, may be a very easy thing to do. For example, if they are discovered in the store of a dealer in old iron, amongst a miscellaneous collection of iron goods, the presumption against him would be slight indeed. But the question of how the articles came there, and for what purpose they were kept there, whether easily answered or not, is one of evidence, and to be disposed of, one might reasonably argue, by the judges who tried the cause. Hood was brought before the magistrates of Dumfries, and was convicted by them of having false weights for use in trade in his

possession. These weights were, it appears, found in the accused's back premises in a rusty condition, for in the case prepared for the High Court, the magistrates stated, "the appellant's allegation in defence was that the false weights were not in use, and had not been used by him, but the evidence did not satisfy us that the said allegation was proved."

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THE judges above referred to formed the majority of the Court before which this appeal came. The Lord Justice-Clerk said, "I am not satisfied that the true *onus*, in the first instance, is on the accused to show that the weights possessed were not possessed for the purpose of using them, or that the presumption in the statute against him may not be shifted. Here it is admitted that the weights were not proved to have been used; it is stated as proved that they were not in the ordinary place for use, and presumably, from their rusty appearance, they were not in a fit state for use. I should have liked some evidence that they had been used or were intended to be used; and in the absence of such evidence, although not without hesitation, I am inclined to cast the balance in favour of the accused, and I suggest that we should sustain the appeal." Lord Young said that the magistrates' impression of the law was erroneous. "The purpose of the statute is only to remove the *onus* from the prosecutor, putting the presumption in his favour, but not to lay the *onus* on the accused." If so, we have here a somewhat unusual case, in which the burden of proof lies upon no one. Lord Rutherford Clark took a very different view, but one with which we believe the majority of lawyers will sympathize. He held that to quash the conviction would be doing great violence to the statute. "I read the statute as meaning, that if possession alone, and nothing else, is proved, a magistrate is entitled to convict. It is impossible for me to assent to the judgment to the effect of saying that the magistrates had not facts before them sufficient to warrant a conviction. But the case goes a great deal further. The magistrates had not only the fact of possession of false weights before them, but they also had the evidence of the accused, led for the purpose of showing that these weights had not been used, and were not intended to be used, and they tell us they were not satisfied that he had made out his case. How, then, can it be possibly said that the facts were not sufficient in law to warrant them in convicting, unless we are to say that the magistrates were not entitled to proceed upon the presumption provided for them by statute?"

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Osborne v. Anderson was a case under the Salmon Fisheries Act, which provides for a weekly close time, commencing at six o'clock on Saturday evening and continuing until the same hour upon the

following Monday morning. During that period the fly nets are to be kept open. On certain Saturdays it was impossible exactly at six o'clock, owing to the state of the tide, to open the fly nets. The accused, following a practice which had gone on for twenty-five years, put them out of fishing order between eight and nine o'clock on such nights, and kept them in that condition until a corresponding hour upon the Monday morning. In other words, the length of the close time (thirty-six hours) was duly observed, but the periods of beginning and of ending it were altered. Anderson was acquitted before the Sheriff, and his judgment was upheld by the Lords Justice-Clerk and Young, the latter describing the Sheriff as "not sticking to the letter, but getting at the true meaning of the statute." Both judges seem to have been much influenced by the consideration of the time during which this practice had prevailed, and of the fact that nobody was really injured by it. Again Lord Rutherford Clark stood forth as the upholder of the letter of the statute. "I cannot say," he remarked, "I entertain any doubt on the question, because I am bound to follow the words of the statute, and to see that what these words require is observed, and that the words making it illegal to have any obstruction during close time receive a strict construction."

* * *

WE have referred to these cases at some length because of their importance. If they are to be treated as authorities in the future, as they will no doubt be, they will greatly increase the difficulty of interpreting penal statutes—a duty laid almost always, in the first instance, upon inferior magistrates. The number of statutory prosecutions is great, and in many cases the judges who try them are not trained lawyers. Hitherto they may have considered themselves safe in following the plain letter of the statute which has to be construed. But if they are to take such facts into consideration as that a violation of the Act does no real harm, or that it has been long continued, or if it is to be held that what the statute says it does not necessarily mean, they will, we fear, soon find themselves in a muddle. Great judges, seated in the Justiciary Court, may perhaps be free to indulge in equitable considerations without much harm being done to the public interest, but if the inferior magistrate is to follow their example, some extraordinary decisions may be looked for.

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How in earth the case of *Bird v. Brown* (August 30, 1887) came to be heard in the Justiciary Court of Stirling, without a vigorous objection being taken to the competency of the appeal, is a mystery. The case had originated in the Small Debt Court unquestionably, but had been transferred to the Ordinary Court,

where it was decided first by the Sheriff-Substitute and afterwards by the Sheriff, with elaborate findings and a still more elaborate note. Clearly it had ceased to be a Small Debt case. And yet Lord Adam, acting under the limited jurisdiction conferred upon the Justiciary Court by the Small Debt Act, heard an appeal at Stirling, and reversed the Sheriff's interlocutor. Surely the competency of such an appeal was worth questioning by the party who held the Sheriff's judgment.

* * *

WE may also notice one or two cases relating to what may be called Justiciary Process. *Collins v. Lang* (Nov. 3, 1887) renders it quite clear that when the prosecutor has deserted the diet *pro loco et tempore*, he must seek not merely a new warrant, but a new complaint. In this case the accused was re-cited upon an old complaint, and a warrant subsequently written upon it for his apprehension. *Per* the Lord Justice-Clerk: "These proceedings were absolutely null. Desertion *pro loco et tempore* puts an end to the complaint, libel, or indictment, while it saves the plea of *res judicata*, and enables the prosecutor to bring a new charge if he thinks proper."

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TWICE, quite recently, the Court has applied a very strict interpretation to clauses in the Summary Prosecution Appeals Act of 1875. The first of these cases, *M'Gregor and Others v. Rose* (Nov. 3, 1887), related to the time for lodging the bond of caution, which, under the statute, must be within three days after the date of the judgment appealed against. It was held that when the bond, although sent by the Sheriff-Clerk upon the third day, had not been received, signed, and returned by the appellant's agent until the fourth, the Act had not been complied with. Again, at a later stage, the appellant is bound, within three days after receiving the appeal case, to give notice of his appeal to the respondent. It was held in *Gairns v. Main* (10 Nov. 1887), that notice delivered on the morning of the fourth day came too late. The notice in this case was not sent through the post.

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THE HISTORICAL SCHOOL OF LAW,—THIBAUT
AND SAVIGNY.

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THERE is hardly another science that exercises such immediate influence upon the life of men as Jurisprudence. Hence the question, as to whether it is moving in a true or false direction, is extremely important; and whoever feels called to work in and through it, must also be earnestly drawn towards acquiring the greatest possible clearness concerning its movements. But for others as well, and especially for all educated men who are indirectly affected in such manifold ways by the prevailing direction of this science, it is not a matter of indifference to know how far they may give their confidence to it.

The Historical School of Jurisprudence has been called to account before the judgment-seat of the educated world from several sides. It has not wanted its defenders, but they have rather spoken to the jurists than to the other educated classes. It would, however, be erroneous to suppose that the accusation has been addressed to the educated generally, because the accusers have not trusted themselves to maintain their position before the jurists; as it would also be to assume that the defenders of the School have wished to use the prejudices of their professional associates in their own favour, or that they underestimated the public opinion of the educated classes generally. Among the educated classes there are men enough who, without possessing special juristic knowledge, are nevertheless capable of forming a sound judgment in regard to the controversy between the Schools as soon as they have been sufficiently instructed about its bearings. And, on the other hand, there are among the jurists a very large number whose prejudices and conveniences are more favourable to the accusers than to the defenders of the School.

I.—THE VIEWS OF THIBAUT.

It was after a long interval that the historical method was again exhibited with full clearness in the department of Jurisprudence. This was occasioned by a controversy concerning another important question of recent times. In the beginning of the present century, when the German nation had at last raised itself against the foreign supremacy of Napoleon, with all the energy of the national feeling which animated it and which had been most deeply wounded, and when it had succeeded, with God's help, in breaking the power which had threatened to crush its political independence and to corrupt its moral character; then it was, in a time of great spiritual elevation, that the better spirits of Germany were mightily roused. The old national evils arose again more vividly before their souls. The perception that a great change in the political institutions was inevitable, disposed them to venture upon strong and incisive proposals. The common spirit of the German people, which had been called upon to undergo the gigantic conflict with the French spirit of aggrandisement, had become so predominant, that the particular distinctions of race and of region within Germany passed for the moment into the background. This condition of things easily gave rise to the hopes of a common German work in the sphere of Law.

It was at this time, and in this mood, that Thibaut wrote a treatise, in which he painted the melancholy condition of the civil law in Germany with black colours, and as a remedy he proposed the rapid composition of a "Law-book," that should be safeguarded from the arbitrariness of the particular governments, and enacted for the whole of Germany. Looking back upon the position now, after the progress which has since been made in the science, it is worth noting how the state of the law as then existing appeared to this distinguished jurist. The chief passage in which he describes it runs as follows:—

"Two demands may and must be made on every legislation, namely, that it be formally and materially perfect. It may therefore be demanded that it shall set up its determinations in a clear, unambiguous, and exhaustive way, and that it shall regulate the civil institutions wisely and fittingly, and entirely in accordance with the wants of the subjects. Unfortunately, however, there is not a single part of Germany where even one of these demands is half satisfied. Our old German Law-books, of which there are in many divisions of the country a great variety of all kinds, express the simple German mind well and vigorously now and then, and so far they could be very well used with regard to individual questions of law in the case of a new legislation. But that they frequently do not correspond to the wants of our time, that they bear everywhere in them the traces of ancient crudeness and short-sightedness, and that in no case can they be accepted as

universal and comprehensive Law-books : on all these points there was and is only one voice among those who know. Such particular native laws or regulations of the special governments, as are attached to these old Law-books, have indeed frequently contributed something good concerning special institutions ; but, as a rule, the whole body of the law presents a fearful patchwork of improvements in detail, and the whole confused mass is often crushed by its own weight. With regard to our old transparent Imperial Laws, the most that can be asserted only is, that they contain some fitting regulations, such as those referring to guardianships and the forms of process ; but they are not proper Law-books, with the single exception of the *Carolina* ; and their unsuitableness for the present time is so fully recognised, that even the friends of the unchangeable must recognise the absolute necessity of new criminal laws. Thus our whole native law is an endless waste of heterogeneous determinations, antagonistic to and annihilating each other, and it is constituted throughout so as to separate the Germans from each other, and to make the fundamental knowledge of the law impossible both to judges and practitioners. But even a complete knowledge of this chaotic mass does not carry one far. For our whole native system of Right is so incomplete and void, that out of a hundred questions in law ninety at least must always be decided out of the foreign Law-books which have been received—that is, out of the Canon and Roman Law. It is just here, however, that the inconvenience of the system culminates. The Canon Law, in so far as it does not relate to the Catholic Church, but to other civil institutions, is not worth mentioning : a heap of obscure, mutilated, imperfect determinations, in part occasioned by the erroneous views of the old expounders of the Roman Law, it is also so despotic in respect of the influence of the Spiritual Power upon secular affairs, that no wise regent could entirely accommodate himself to it. The last and chiefest source of law for us is, accordingly, the *Corpus Juris*—the Roman Law-book—and it is the work of a foreign nation very unlike ourselves, springing from the period of its deepest decay, and bearing on itself traces of this decay on every side. Any one must be entirely carried away by passionate one-sidedness who congratulates the Germans on account of their adoption of this abortive work, and recommends in earnest its further maintenance. It is indeed endlessly complete ; but it is so just in the sense in which the Germans may be called endlessly rich, because all the treasures below their soil down to the centre of the earth, belong to them,—if it could only be all dug out without cost ; but there, unhappily, lies the difficulty ! And so it is with regard to the Roman Law. It cannot be doubted that deeply learned, acute, and indefatigable jurists can collate on every theory something that is exhaustive from the mutilated fragments of this Law-book, and that we, perhaps, after a thousand years will be so happy as to

have a classical exhaustive work regarding each of the thousand important doctrines which still lie in its darkness. But it is of consequence to the subjects of it not that good ideas are in fact preserved in printed works, but rather that the Law shall dwell livingly in the heads of judges and practitioners, and that it shall be possible for them to acquire comprehensive knowledge of Right. This, however, will always continue to be impossible in the case of the Roman Law."

A few observations may be attached to this exposition of Thibaut's view. We see that Thibaut seeks the whole of the existing system of Right primarily and exclusively in the laws. Even the native German Right is based only upon the old German laws, upon particular laws and Imperial Laws. What Thibaut understood by these old German laws is not clear, for the *Leges Barbarorum*, which had been antiquated for centuries, were not properly laws in the modern sense, nor are they old German; nor are the German Law-books of the Middle Ages made up of laws. But as, according to Thibaut's view, the existing legislation is partly defective, partly despotic, and partly alien; and as Right, however, presupposes a complete legislation: it is easy to understand how Thibaut should have held that the publication of a universal civil Law-book, or Code, was the true and only remedy for that morbid condition of things.

This view of the state of Right was discouraging in itself; and such a representation could not but be depressing to the science which was compelled to occupy itself with that Right. How could any one with inner satisfaction explore the spirit of German Right, or develop the native system, if he had only to ransack "an endless waste of heterogeneous determinations, antagonistic to and annihilating each other"? How was it possible to devote oneself with love to the study of the Roman Law, since here, too, an abortive Law-book, derived from the period of the deepest decay of the Roman nation, could but badly reward the trouble of studying it? It is not remarkable, then, that Thibaut in another passage of his treatise should refer to Persia and China; for a worse system of Right could not easily be found there, than that which here closed in and oppressed the spirit with its narrowing limitations. It is, in fact, much more remarkable that Thibaut should afterwards have still continued to devote so much attention to the Roman Law, and that he even spent his whole life in its service. According to his view, there is no blessing to be expected, either for Law itself or for Jurisprudence, so long as better material is not presented for elaboration through a new book of laws.

It is very true, as Thibaut says, that Legal Right ought to dwell, not merely in printed works, but *livingly* in the heads of judges and lawyers. But this is still far from being enough, apart altogether from the fact that it may be justly doubted whether

the modern laws are really any more vital and living than other printed works. Enough has not been said, in taking that position merely; for Right ought to be a living thing, not only in judges and professional lawyers, but in others. It ought not to be enclosed within the narrow circle of the juristic guilds, nor to exist only for them. It ought rather to be present in the powerful and the weak, the high and the low, the rich and the poor, the educated and the uneducated; it ought to be a *living Right in all and for all*, embracing them all, connecting all, and controlling all.

This is the turning-point which is decisive in the development of the scientific views of Law; and it is from this point of view that we are carried on to that method to which Hugo had already referred, but to which Savigny has given the clearest expression.

II.—SAVIGNY'S VIEW.

The famous book of Savigny, *On the Vocation of our time for Legislation and Jurisprudence*, appeared shortly after Thibaut's treatise. Both men belonged to the noblest spirits of the German nation. In both there beat a warm heart for their country. Both of them were then inspired and stimulated by the great movement of the people and their princes, for the saving of Germany; and both were resolved, for their part, to work for a better formation of Right and of Jurisprudence; and in both there was great inward power available for this purpose.

But notwithstanding their having all this in common, how very different were the two men, when compared in their mode of apprehension and in the direction of their efforts. The whole bearing of their several productions is at once seen to be quite different at several points. While Thibaut depicts the deep decay of Right with zeal and even with passion, and with impetuous and anxious haste demands the rapid preparation of a new Code of laws, from which he expects a happy and sudden reform—not to say a revolution—of the existing condition of the law: Savigny takes up a standpoint from which he looks over and beyond the question at issue, and he characterizes, with great calmness and clearness, the chief errors of the time, as well as the nature of positive civil Right and Law. Nor did he overlook the fact, that the condition of the legal Right of the time was unhealthy; but, as he consults the history of this Right during centuries, and even thousands of years, he does not regard its condition as giving such cause for despair as had been depicted, but he trusts for improvement to the nature of the people, which is still sound at heart, and to the silent operation of a future that is rich in favourable prognostications. In the remedy proposed by Thibaut he has, however, no real confidence: neither in the remedy regarded in itself, for it appeared rather to disturb than to further the natural development; nor in the advocates of the

remedy, because he held the view that their science was still more unsound than the state of Right which they proposed to heal; nor in the practical jurists who are responsible for the practice of the law, because he supposes that these would either not be at home in any sudden transformation of it, or that, severed from the tradition of the past, they would introduce new caprices and new abuses into it. Indeed—what was but too easily felt, however politely Savigny wrote of it in any reference to his opponents, and however objectively he described its state—he finds the chief seat of the disease in the *physicians* themselves.

But however important the question as to the suitability of new and complete codes of law may be in itself, it has nevertheless only a subordinate value as regards the significance and scientific position of the *Historical School*. And it is a vulgar error to suppose that the historical view of Right is pre-eminently distinguished from the other scientific theories in Jurisprudence, by the fact that the adherents of the former view are prepossessed against the composition of new Codes of law, whereas the adherents of the latter are prepossessed in their favour. For even Savigny has not declared himself absolutely against every form of legislation. And if he indeed refused to credit the jurists of his time with the capability of constructing a good Code of laws, he has himself contributed much to further and mature this capability. Thus there *may* be jurists, and there *are* such, who have completely accepted the historical view of Law, and yet hold that comprehensive Legislations are desirable from time to time. The fact is that the controversy about a universal civil Code gave the occasion for bringing to light *another* opposition in the mode of viewing positive law, which lay deeper, and was not dependent on the decision of that controversy. Thus far we have been compelled to touch upon that controversy in this connection, but our subject does not require us to explain the reasons for and against new codes of law in further detail.

The view of the older jurists which then prevailed, and in which Thibaut's thoughts also moved, made all *positive Right* arise from Laws,—from *Laws* in the sense of *express commands or prohibitions of the Legislative Power*. Customary Right was regarded as an obscure source of the formation of Right, and it was in general only not quite rejected because the incompleted Legislation appeared as if it could not yet dispense with some completing elements, and it thus silently and of necessity allowed it to exist.

Savigny, however, again took up the view of Law or legal Right, which regards it, like language and moral practice, as *a side of the life of the people*. As far as history reaches, we always find *whole peoples* in existence, which are distinguished from each other by descent, language, mode of life, moral practice, and forms of Right. Peoples grow, ripen, decay, and perish:

some more rapidly, others more slowly; some before and some after certain others; some rising to eminence and distinguished by rich fates, and others gliding past in a monotonous way,—all different in endowments, virtues, and failings. The individuality of the people gives itself expression in its modes and forms of Right as well as otherwise, and Right will be different in the period of its youth from what it will be in its age. Savigny then delineates, in a rapid outline, these different states of Right, keeping before his eye especially the history of the Roman and German law, as follows:—

“The period of the youth of the peoples is poor in conceptions, but it enjoys a clear consciousness of its states and relations; it feels and lives through these, wholly and completely: whereas we, in our artificial and complicated existence, are overwhelmed by our own richness instead of enjoying and controlling it. That clear and natural state thus authenticates itself pre-eminently in the civil Right of the people; and as in the case of every individual, his family relationships and his possession of the soil become more important by personal appreciation, so on the same ground it is possible that the rules of private Right itself may be included among the objects of the popular faith. But those spiritual functions require a corporeal subsistence in order to be maintained. In the case of Language, such an embodiment is given in its constant uninterrupted usage; and in the case of the Constitution, it is presented in the visible Public Powers. What, then, takes this place, or represents it, in connection with civil Right? In our times this is done by expressed determinations, which are communicated by writing and oral discourse. This mode of maintenance, however, presupposes considerable abstraction, and it is therefore not possible in that youthful time. On the other hand, we there find symbolical actions wherever relationships of Right arise or are about to pass away. The sensible perceivableness of these actions is what maintains Right externally in definite form; and their earnestness and dignity correspond to the significance of the special jural relationships which are peculiar to this period. In the extended use of such formal actions, the German tribes, for example, agree with the old Italian races: only that among the latter the forms appear to be more independently determined and more fully regulated, a fact which may have a connection with the constitutions of the cities. These formal actions may be regarded as the special Grammar of Right in this early period; and it is very significant that the main business of the older Roman jurists consisted in the preservation and exact application of them. In these later times they have been frequently despised as mere barbarism and superstition; and we have very greatly plumed ourselves on the fact that we do not have them without considering that we are also everywhere provided with juristic forms,—which, indeed, are just lacking in

the main advantages of the ancient forms, namely, their visibility and the universal belief of the people, while our forms seem to every one to be arbitrary, and are therefore felt as a burden. In holding such one-sided views of earlier times, we are just on a level with the travellers who observe in France, with great astonishment, that little children, and even the most common people, speak French quite readily!

"But this organic connection of Right and Law with the nature and character of the people likewise exhibits its reality of itself in the progress of time; and herein it is also to be compared to Language. As in the case of Language, so in the case of Right, there is no moment in which it absolutely stands still; it is subject to movement and development the same as in every other tendency of the people, and this development is also ruled by the same law of inner necessity as the earliest of its manifestations. Right therefore grows with the people; it unfolds itself with the people; and at last it dies, when the people loses its individuality. But this inner progress of development, even in the period of civilisation, presents a great difficulty to those who study it. The proper seat of Right is the common consciousness of the people. Now in the Roman Law, for instance, the universal natural elements of marriage, of property, and so on, may easily enough be conceived as giving the characteristics of that consciousness; but in regard to the immeasurable details of the system of which we possess an excerpt in the Pandects, every one must recognise that it is quite impossible to take up the matter thus. This difficulty leads us to a new view of the development of Right. In the course of their advancing and increasing culture, all the activities of the people always become more and more separated, and what was once carried on in common, afterwards becomes restricted to particular classes. The jurists thus arise as such a separate class. Right is then further developed in its language; it takes a scientific habit and direction; and whereas it formerly lived in the consciousness of the whole people, it afterwards comes to be limited to the consciousness of the jurists, by whom the people are then represented in this relation. Henceforth the existence of Right is more artificial and complicated, as it has thereafter a double life, both as part of the whole life of the people which it does not cease to be, and also as a special science in the hands of the jurists. From the interaction of this double principle of life, all its later manifestations are explained; and it thus likewise becomes conceivable how even such a huge mass of details could arise in a wholly organic way, and without specific choice and intention."

The perception, that at the period of the highest development of the Roman system of Right, the Roman legislation was extremely scanty; that, on the other hand, the legislation became much more important, and at last absorbed the whole system in itself, when

all true life in the nation and in the evolution of Right had already died out; is then stated in fuller detail by Savigny, in order to give the proof that a relatively perfect state of Right by no means necessarily rests upon a relatively complete Legislation.

Thus, then, the *nationality* and *individuality* of Right again became more vividly and visibly seen. Right was not regarded merely as a thing commanded from above, but as having grown out of the spirit of the nation as one of its forms. It is not to be regarded as an arbitrary thing, which to-day could be so and so, and to-morrow otherwise, but the past is to be viewed as closely connected and entwined with the present and the future. Right is not a contingent thing, but it is determined from within.

This insight into the nature of positive Right is what is *alone characteristic* of the Historical School. And it is only from this point of view that its achievements, and the transformation which the Science of Jurisprudence has experienced through it, are to be judged.

MARRIAGE IN THE GERMAN MIDDLE AGES.

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(Conclusion.)

THE Crusades introduced deep changes into the whole social life of the time, and they were not without enduring influence upon the relations of women generally, and upon Marriage in particular. Whole masses of people streamed together for the same purpose; they were united by the call of the Pope, and the Christian faith; and each of them presented the manifestations of a hitherto exclusive nationality, and each was ready spiritually both to give and to receive. It was—if the figure may be allowed—as if the waters of all the quarters of heaven had become united, to foam for a time in the same channel, and when they separated, what stream could be said to have kept its earlier current? What stream rather had not both given and received? Could it be otherwise than that the soil upon which the different populations thus met, presenting the ruins of the Greek and Roman civilisation among which they pitched their camps, as well as the fantastic life of the East, should work strongly upon these receptive hearts?

The wild, rude warriors became polished knights, and the influence exerted upon the mental education of the women was equally marked. Here we may recall the fact that the women had been the subjects of culture from an earlier time, so that even Wolfram of Eschenbach could only transmit his poem to the after-world through the pen of a woman. Women were now compelled to step out of the domestic circle into the public movement of life, and

the honourable but awkward social relations of the sexes were forced to yield to lighter and finer forms. This resulted in the old pure love of the age of the Minstrels.

I will not say that it was the conscious policy of the Church to give nutriment to the chief tendencies of the time, and to impress upon them the ecclesiastical stamp in such a way that she might always continue to be the leader and centre of the spiritual movements. It was rather an instinct which made her capable of this, and it also arose as a reaction from the spiritual movements themselves. The Church thus made the old German warlike spirit serviceable to herself by inciting it to the work of Christian conversion; and it gave an ideal to the new growing reverence for women in the worship of Mary. This Mariolatry was indeed not new; in earlier centuries it had even found extravagant expression, which had been forbidden by the Church; but it now burst forth with conquering force, and the worship of the heavenly lady could not but react upon the position of earthly women. It is, however, not my intention to give a history of the idea of love presented by the minstrels and troubadours, nor to enter upon its fine forms and its degeneracies, its inwardness and its play of feeling, its sound substance and its peculiar outgrowths.

By the influence of this ideal love the marriage relation was transformed, and the yoke of marriage was lightened for the woman; but ultimately it was also so weakened that it held together but loosely, and became carious and unsubstantial. Marriages became generally finer, but they also gradually became less moral. An increasing respect was paid to women as a whole, but the individuals often showed themselves to be less worthy of it than before. Women loved more, and were more loved; but it came ultimately to this, that men came also to love the wives of others; and Ulrich of Lichtenstein, the prototype of this degenerated love-worship, travels for months to see his lady-love, and then goes back to his not unloved wife, who receives him in a friendly way, as if all that were understood of itself. The Romance literature of the twelfth and thirteenth centuries may be referred to, as giving full proof of these observations.

But such an idea of marriage did not long find a place in Germany. When the sun of the Hohenstaufens, with all the poetry and culture which it cherished and charmed forth, went down; when the minstrels no longer vied in poetic contests for the favour of princes and ladies, but the harp had given way to the sword: then did women also descend from that artificial and giddy height, and became again honest spouses and housewives, as they had formerly been.

We now turn to the form of the *celebration* of Marriage, and we shall also draw into the circle of our view the act of priestly consecration, which will bring us up to the verge of the parliamentary conflicts and controversies of modern times.

It has been already said that the essential element in the formation of marriage was the purchase of the bride, as it had taken form in the course of time. This had become symbolically an apparent purchase, and a sort of dowry was thus bestowed on the bride herself by the bridegroom. If we add to this the delivery of the wife and the right of guardianship over her to the bridegroom, which took place publicly in the place of justice, called the *mallum* (whence the German word *Gemahl* for husband), we have the elements that constituted the conclusion of the marriage. At least this held where, and so long as, nothing was known of ecclesiastical consecration, for till then there was no legal distinction between betrothal and marriage.

The form in which the delivery of the wife took place was simple and natural. A suitor—or, as he was called, a “for-speaker”—inquired into the mind of the two marrying persons, made them exchange their consent, completed the purchase, and gave away the bride. The *laws* of the time are silent about the mode of the celebration of marriage, and little further knowledge than what has been now indicated could be drawn from them. Marriages were to be publicly constituted. All the laws demand this; but with this condition the secular lawgivers were satisfied in a matter which was regarded as belonging to the special domain of the Church. However, the ecclesiastical regulations, numerous as they are—and their substance will afterwards be shortly indicated—give us no picture of the real life of the time, but only state the obligations of the Christian religion and of morality, which were mostly unfulfilled.

It is only the poetry of the Middle Ages that gives us glimpses into the life of our early ancestors, and we shall let it speak on the subject.—Thus in the *Meir Helmbrecht* the wedding of the robber Lammerschlind with Gottlinde, a peasant girl, is thus described:—

“Then rose an old man loftily,
And wise and full of words was he,
And spake full well of everything.
He put them both within a ring,
And spake to Lemberslinde :
Will you have this Gottlinde
To wed and keep ? If so, say yea.
Most gladly yea the youth did say.
He asked him once again next hour ;
Most gladly, said the youth once more.
A third time he did ask again :
And will you take her ? When, more plain,
He said, Upon my soul and life,
I willing take her as my wife.
Next said he to Gottlinde,
Will you have Lemberslinde ?
And take him willing for your man ?
Yes, sir, if I, with God, it can.
Take you him willing ? again said he.
Willingly, sir, if you give him me.
A third time asked : Will you have him ?
Yes, sir, if now you give me him.

Then gave he Gottelinde
 As wife to Lemberslinde,
 And he gave Lemberslinde
 As man to Gottelinde.
 All sang, joy to express ;
 And he her foot did press."

The last line, "And he her foot did press," requires a word of explanation. This was, in fact, a sign of taking possession, as when the foot was placed upon a bought house, or a bought field, and it was thus declared to have become the property of the person. In the present day the belief still prevails here and there in the country, that if the bride puts her foot upon that of the bridegroom during the wedding, she will have the right of dominion in the marriage. Do we not find in this an explanation of the idea attached to the slipper of the wife ruling her husband.

We find also in the *Nibelunglied* that the marriage of Siegfried and Chriemhilde was celebrated in like manner :—

"They bade them with each other then enter in the ring,
 And asked her if she willingly would have the valiant king.
 In maidenly simplicity she blushed, and paused awhile,
 Yet was it for the happiness of Siegfried, without guile,
 That she did not refuse to stretch to him her hand ;
 So willingly she wed the noble King of Netherland.
 And as he vowed to love her, as the maid to him had done,
 The friends looked on with gladness, and saw how they were one ;
 And Siegfried in his arms embraced his loving bride again,
 And kissed was fair Chriemhilde by many heroes then."

In these examples we nowhere find even a trace of ecclesiastical consecration. Was there such a thing at all at that time? and was it demanded by the Church as indispensable and necessary? It is beyond doubt that the Church has never ceased to represent the priestly co-operation at the celebration as praiseworthy and conducive to salvation, and that since the year 1215 it aimed at making the conditions formerly used in France to be universally observed. But it can just as little be doubted that, up to the time of the great Council of Trent, or to the middle of the sixteenth century, it also recognised the marriages that had been celebrated without the co-operation of the priest as legal and valid, although it also laid down penalties for those who were married apart from or without the Church.

The people, however, kept tenaciously to their hereditary usages ; and while, in the northern kingdoms, the ecclesiastical influence appears to have early gained ground, we hear in Germany the lamentations of the Church councils about marriages being celebrated in an unecclesiastical way ; and as late as the fourteenth century it is written in the *Jülich Ritterrecht* dryly thus : "If a man belonging to the nobility wishes to take a wife, then they may together give a public pledge before the people. This is the

direction of the nobles and aldermen (*Upladen*); such is a right marriage among the nobility, and an old custom."

It was only in the twelfth century that the higher classes began to accommodate themselves to the demands of the Church, and that ecclesiastical celebration of marriage was regarded by them as right and becoming.—Thus in Henry of Freiberg's *Tristan* the bishop comes in among the happy dancers to perform the ceremony; and in Gottfried of Strasburg's *Tristan and Isolde* it is said:—

"Now, sir, in gay and gladsome way,
Give us a bridal fair,
And 'fore the friends from everywhere,
Receive and wed her openly.
And yet before you do it free,
Take her in church to wife,
As is the use of Christian life,
That lay and priest may see you mate.
So shall your weal be good and great,
And in all things you try,
Success will crown thereby
Your life, and fill your house with joy."

It was only the peasants who were still wont to carry on the marriage celebration according to the old customs, and it was not till the day after the marriage that they asked the blessing of the Church. Yet in the description of a peasant marriage of the fourteenth century, the poet already finds it necessary to refer in his rustic dialect to the want of scholars (*schuoler*) and priests and choir boys:—

"Noo silence, auld and young,
Spak oot wise Neodunge.
Jockie, you are an honest man,
An' wilt thou wed wi' Jen' in han' ?
He spak : I' faith will I.
Then Neodunge said : Come, Jenny,
Say, wilt thou wed with Jock ?
But still she stood, no word she spoke.
And then he speired again.
Aye, so bids my Minnie fain.
But Neodunge said : Ne'er did she
Compel you this, so say't to me.
And so there will made it to be,
And thus the wedding was rehearsed
Without a scholar or a priest."

But now we shall attend a marriage itself. But it is not into the glittering throng encircling a court-marriage, with tournaments, gay processions, and knightly feats, that we will press; nor shall we take part in the marriage amusements of the country, with all their humour and coarseness. Rather will we go into the walled cities, and wind through the narrow angular streets in which industry and art have taken up their abode; and we will betake ourselves with the invited guests to the marriage house of one of the citizens, in the later German Middle Ages.

The engagement has already long since taken place. The

father of the bridegroom has, according to old use and right, asked the father of the bride for his daughter, and greeted her as the betrothed of his son; the maiden has blushinglly nodded her consent; the fathers have concluded the alliance; a draught of good wine has sealed it between the parents, and an honest kiss between the young people. Then in the house of the bride there has been a busy time with sewing and tailoring. The female friends and playmates gave their help, and the gown was sewed, with its gracefully folded train carefully measured to its due length, for the rigid rule of the Town Council was inflexible. Then the linen is drawn from the press—from earliest times the pride of the German housewife; and the bridal dress is made of foreign samet, mostly white, artistically embroidered with gold according to the position of the bride, and as the high and wise Town Council allowed it. And now, as the day of the marriage approaches, when the criers in the church have challenged in vain all men and women to say, frank and free, if they knew of any hindrance to the marriage, the turmoil in the house of the bride becomes greater and greater. The artistic tailors come to fit on the marriage dresses. The brethren of the guild of Hans Sachs, or St. Crispin, appear, bringing the shoes finely worked in silk and cordovan, and embroidered in the daintiest way with gold. To rich brides the artist brought the ornamental *tampion*, a girdle consisting of costly metal plates, and adorned with little bells, and then when the bride stepped in, there was a sweet tinkling sound; but those who were not so rich had to content themselves with a gold chain or a beaten silken band; for so the command of the high authorities willed it. The purser contributed the leathern pocket that hung at the girdle, which was finely knitted, and which went along with spindle and key as the symbol of the housewife.

There came also the "marriage-bidders," in their gay holiday attire, and with their well-known sayings. When they had spoken the beginning of their story, every one could carry it on. Their form of invitation had been addressed to the grandparents and the great-grandparents in their day, and all knew it. They brought with them a capital thirst, suitable to a marriage, but even this in later times fell under the regulation of the police. They were only allowed to have a certain quantity of wine, and severe punishment was inflicted if they took more. They were then told the names of all who were to be invited. First came the most important persons, the bridesmaids and the attendants of the bride. Everything was regulated and prescribed by number. Nimblly they scattered themselves through the streets of the old city, gladly bringing their glad message, and wherever they came they received food and drink from those they invited. Messengers also went out to the country with invitations, for the posts were not yet in existence. The master of the musements announced himself; he was the leader of the town

pipers, and his duty was to heighten the enjoyment by the arts of his company. Rich people also summoned the chief of the Drum-guild, and he was enjoined to have the drums well beaten on this festive day, and to make the trumpets sound forth. The music was the finer the louder it was.

At last the longed-for wedding-day comes. On the previous day perhaps a little festival has taken place. It was the rule in Lübeck that the bride should not invite more than six-and-twenty maidens, and that the dance should not last longer than till two o'clock in the afternoon. There was to be no uproarious assembly in the evening. Early in the morning of the wedding-day the bride and bridegroom have each, in their own house, assembled their friends and companions around them. All are festively entertained with food and drink, as far as the Town Council allowed it. Then the procession is formed before the house of the bridegroom. In front are the never-failing musicians; then comes the bridegroom in his finest clothes. He has the groomsmen at his side, and other friends in the rear, and amid the merry swell of the music he approaches the house of the bride.

Formerly it had been the custom—and it survived in the country till late in the eighteenth century—that the bridegroom should now again sue solemnly for his bride. In the cities, however, this custom had almost died out by the end of the fifteenth century. In the house where the marriage was held the bride and the bridegroom silently greet each other, for so the custom of the time would have it. The bride stands closely surrounded by her bridesmaids, with a wreath upon her head, and with the hair neatly tied up, which had hitherto fallen freely down upon her shoulders. Soon the bells of the parish church sound full and strong through the streets, reminding the citizens that a new household is being founded, that two inhabitants of the city are about to enter into the marriage bond. It is the sign for the starting of the marriage procession. The musicians again step ahead; next comes the bride, with her maids and her kin; and behind follows the bridegroom with his friends. The procession is hurriedly followed by the jesters and the players, who try to win a laugh from the honest burghers as they stride past, or a blush from the women, or a hurrah from the surrounding crowd. The procession halts before the church door. The clergyman stands there in full canonicals, and as the bride and bridegroom step up before him, with a loud voice he commands all to be still. This is indeed very necessary, for the jest makers look more to plying their trade than to the earnestness of the holy ceremony. Once more the priest speaks, and announces to the assembled people that a marriage is here about to be celebrated. He asks for the consent of the marrying persons; he makes them exchange rings as the pledges of wedded fidelity; and he declares that the covenant of marriage is formed, and blesses it. The whole

procession, with the priest at its head, then enters the church; the bride and bridegroom partake of the Holy Communion; and with this the ecclesiastical solemnity is brought to an end.

In the same order as that in which they had come, the procession now returns in a festive style to the house, or even to the Town Hall, only that the bride and bridegroom now walk side by side. In the country it was even the custom to drive the young people with blows out of the church, that they might be the more certain to remember the holy ceremony which had just been performed.

In the house the table is covered, and the guests sit down in any order, the women and the men together,—a custom which was formerly thought improper,—and they eat and drink in honour of the young pair. And if you would know what was eaten, take, for example, the regulation at Nürenberg, which was as follows: "Upon every table there may be a roasted capon, and if no one eats of flesh on the same day, there may be for the same persons an eating or two of fishes, modestly given or served." Venison and peacock were strictly forbidden, nor was it allowed to send any tit-bits to the houses of the good friends who had not been able to be invited, "with the exception of the warder on the tower of the parish church in which the marriage was celebrated; it is permitted to give him a quart of French wine."

Around the tables go the riddle-makers and the speechifiers, rewarded by the laughter of the company, and sometimes also by a smart, well-meant blow, which was not taken amiss; but they preferred to have a gift of some kind. Later come the actors and the players, and then, according to the command of the Church, the clergy who were present retired.

After they rise from the table, during which time the bride has modestly covered her head with the wifely hood, the young people sit down together to receive the marriage presents, which are regulated by the rank and means of the guests. Thereafter the dancing begins in graceful circles, generally opened by the bride and bridegroom; and it is regarded as a high honour to dance with the bride. All the friends of the young couple are invited to the dance; for, as the Nürenberg order of marriage says, "Then, after the table, they may ask to the dance whoever they like, but on the condition that nothing else shall be given to eat or drink but fruit and confections and French wine or Rhenish wine, or some such other." At last the joyful company disperse, and go home, but not without giving a gratuity in money to the servants in waiting: to each of them at most two farthings, according to the regulation of the Nürenberg Town Council.

It may be observed that the disorderly habit of the *Charivari*, which prevailed in France till the fifteenth century, does not appear to have been common in Germany. When a widow was married, the fashion was for all the unmarried men in the place

to gather in the evening before her house, disguised in masks, and provided with kettles and other tin and copper utensils. With this they made a jingling and discordant music, that went thrilling through marrow and bone, and which they only brought to an end when they received from the house the usual presents, and especially the coveted draught of wine.

On the morning after the marriage, the festivities began anew. The young married people invited their friends to "egg-cakes" or omelettes,—but fritters and pork pies were also allowed,—and, although the olden times kept up no festivities before the marriage, yet so much the more were they in favour after it, so that they often lasted for a whole week. On the following Sunday the new-married pair went solemnly to church, and for the first time worshipped together; and the magistrates took witness of it, and this had to serve as evidence of the marriage; for there were no church registers yet.

And thus the married state was firmly founded. The man then felt himself an equal among the married burghers; he moved with a prouder gait; he had now, indeed, attained to full citizenship, with a household of his own, which might be the source of a flourishing and vigorous race. But the wife busied herself and laboured in the circle of her domestic duties; she became the companion of the man in fortune and misfortune, and was devoted to him faithfully in heart and life.

"One body and two souls, one mouth, one heart,
Faithful, pure, and chaste, and ne'er to part;
Here two, there two, yet one in constant faithfulness!
Where love with love like this is found,
No cares for silver, gold, or jewels will abound;
With such a pair there shines the gleam of happiness.
And aye when love does thus bind hearts in one,
Beneath one roof, life's joy is won;
When arm in arm they sweetly twine,
They feel life's highest bliss divine;
Whoe'er finds this doth gain life's chief reward,
And God's own favour doth his happiness guard."

So the Minnesinger Reimar sings of Marriage. And this was the way of Marriage and its celebration, in the German Middle Ages.

PRIVATE BILL LEGISLATION.¹—I.

BY R. VARY CAMPBELL, ESQ., M.A., LL.B., ADVOCATE.

THERE can be no doubt of the large amount of excellent business ability in the Imperial Parliament; there can, on the other hand, be as little doubt that much of this ability is wasted either by

¹ Being the opening lecture delivered to the Chartered Accountants' Students' Society of Edinburgh. 1887.

faulty arrangements for the discharge of necessary business, or by its being set to much work which might, with great public advantage, be left to other hands. The proper public business of Parliament may be said, in a rough way, to include general Legislation, Finance, and Administration,—the first of these heads having to do with the passing of Public General Acts, the second with the control of Imperial Taxation and Expenditure, and the third with the criticism and supervision of the Executive, sometimes in the most minute details, as to its Home, Foreign, and Colonial Policy. As both Houses of Parliament begin their sittings ordinarily only in the afternoon after the ordinary business-day is over; and as the House of Commons, at least, is hardly ever in full activity until the evening; it may be said that the public business of the Empire is presently attempted to be done as night-work. Every Public Bill is, moreover, after its principle has been accepted at the second reading, submitted ordinarily to a committee of the whole House, which then presents the preposterous spectacle of a crowd, varying in number from 670 to the merest quorum, according to the interest taken in the measure, attempting to act the part of favourable or hostile draughtsmen over various clauses. The result is notoriously that British Statutes are often such wonderful productions for obscurity and inconsistency, as no respectable solicitor would venture to offer to private clients for the regulation of their private affairs. Why Parliament should not intrust the details of all, or at least a large proportion, of its public measures, legislative or financial, to specially selected committees of its own number, on the usual principle of the division of labour, it is difficult to say. Why, above all, the modern Parliament should not, according to earlier and better usage, do its work in ordinary business hours, is not obvious, though many reasons may be assigned—some serious, from the Government Offices, and others ridiculous, from the London Law Courts, or other resorts of members carrying on private business in London, to whom the House of Commons naturally is most convenient as a London evening club. One standing reason of the more respectable kind is, that the ordinary business hours of the day, or a few of them, say from eleven or twelve to four or five, are usually devoted to the sittings of committees of non-professional members upon Private Bills. As the members of these committees cannot attend to Private Bills and to the public business of Parliament at the same time, public business is relegated to the night hours, and there are year by year increasing complaints of arrears in general legislation, and of inefficient control over public taxation, and the expenditure of the great spending departments. There is no one, apart from all questions of partisanship, who can regard the present arrangements of Parliament for the conduct of public business with satisfaction. Putting the prepossessions of prejudice or malevolence aside, consideration of the composition of Parliament, and the available ability within its walls, seems clearly

to show that there are ample power and time for the discharge of the public duties of Parliament, if proper arrangements (however inconsistent with merely London ways) were made. It concerns the business credit of the nation, as a whole, to insist that Parliamentary rules and practices shall be amended, so that the proper work of Parliament may be accomplished in a more thorough and business-like manner than at present. As one important step towards stopping the present disorganisation and consequent paralysis of Parliament for its proper public duties, the weighty report of the Commons' Committee on Procedure in 1886 has met with general acceptance, to the effect that, in order to any improvement, "it is essential that arrangements should be made to relieve the House from the duties now discharged by Private Bill Committees."

It is not, however, only from the point of view of the relief of Parliament, and its greater freedom for its proper public work, that the subject of Private Bill Legislation is to be considered. Taking, as in all such matters is the only safe course, an account only of how Private Bill business can best be done, it may be affirmed, *first*, that the present London arrangements are bad; *second*, that the modifications hitherto adopted are insufficient; and *third*, that the most useful plan is to remove the inquiries into Private Bills from London altogether, and to cause them to be conducted locally in the localities specially interested. The subject may be treated in the order just mentioned.

I. PRESENT ARRANGEMENTS.

Private Bills may be said, in a general and sufficiently accurate sense, to include all Acts of so-called legislation which affect only particular individuals, companies, corporations, or localities—as distinguished from Public General Statutes. Originating constitutionally in the right of the subject to petition Parliament for redress of grievances, they were for long rather personal than local in their nature. Parliament by degrees has got rid of most of the merely personal Bills; of some, in early times, by establishing the practice of remitting them to the ordinary Courts; of others, in later times, by constituting new Courts, such as the English Divorce Courts in 1857 for matrimonial questions, which actually, before that date in England, required nothing less than an Act of Parliament for their solution; and of others, such as Private Estate Bills, in still later times, by general Bankruptcy Acts, and by general Settled Estate Acts. The Private Bills, which continue to be decided by the British Legislature, are now local rather than personal; and it is this century, and mainly the years since the great railway constructions of 1845 and 1846, which have seen the growth of Private Bill Legislation in its modern shape. Some idea of the large amount of work involved in this private branch of Parlia-

mentary business may be obtained, when it is stated that, from 1801 to 1884, Public General Acts are estimated at 9556 in number, while the Local and Personal or Private Acts during the same period are given as 18,497. These Private Bills are divided by Parliamentary authorities into two classes—the first of which confers such powers as those of corporations, of charging ferry, pier, or harbour dues ; or removes doubts or disabilities as regards the status of particular persons, whether individual or corporate. The second class, which is more particularly in view at present, includes all Bills which confer aggressive powers, and the right to construct works by compulsory taking of land upon compensation. This larger and more important class includes Bills for Railways, Canals, Gas, Water, Tramways, Harbours, Electric Lighting, or the like. As to all Private Bills, of whatever class, there is no idea in any one's mind that the privileges sought in them are, or should be, given capriciously, or out of mere grace and favour, to the petitioners, upon the mediæval theory of complaints to Parliament for redress of wrongs or grievances. On the contrary, when the petitioners for a Private Bill are a great railway company, or other wealthy company or corporation, the public, which in its units is rather helpless to criticise or object under the existing system, is somewhat disposed to regard the petitioners as tolerably well equipped to fight their own battles, and as rather more likely to be the oppressors than the oppressed. Private individuals, unless fortified by exceptionally long purses, or exceptionally large interests in the matters involved, are not frequent meddlers in the great battles of the companies and the corporations before Private Bill Committees. The interests of the State and the local public, as affected by a Private Bill, after it has passed the second reading, are attended to mainly by the Committee on the Bill ; and it would be wrong to suggest for one moment that Private Bill Committees are influenced by any other considerations in deciding whether the preamble is to be passed or the clauses are suitable, than a strictly judicial balancing of the advantages and disadvantages likely to be attendant upon the scheme. In other words, the modern Private Bill Committees, which have succeeded to the old receivers and triers of petitions, endeavour, as far as possible, to act upon system in reporting for or against Private Bills ; and their successive labours have established a jurisprudence or practice of Parliament, the knowledge of which is professed, along with the study of the personal idiosyncrasies of chairmen and members of committee, by a large and influential Parliamentary bar, aided by an equally large and flourishing body of Parliamentary solicitors. It would be utterly wrong and foolish to underrate the value of the many maxims, principles, rules, and precedents which have been evolved in the modern practice of Private Bill Committees. There is a large experience on every possible subject to which a Private Bill can relate, accumulated by the labours of

many of the acutest minds of the kingdom in and before Private Bill Committees, as well by chairmen and members as by counsel, skilled witnesses, and solicitors. Much of this wisdom is recorded in statutes or standing orders; much is to be found in departmental regulations or private books of Parliamentary practice. But the great point is, that none of it is beyond ordinary faculties or ordinary industry to pick up; and none of it is merely personal and temporary, excepting always the study of the personal peculiarities of individuals, as chairmen and members of committee. There is thus a system, within undefined limits, on which Private Bill Committees act; and there is also, as is common in all untrained tribunals, a large personal equation on which the Parliamentary bar acts. The result is what is known as Private Bill litigation, which appears to the impartial spectator to differ from ordinary litigation mainly by being much more full of uncertainties, and to be conducted, in its regard to relevancy, or the ordinary rules of evidence, in a fashion which would be rejected in any Small Debt Court. It is a significant fact, that so long as a man is addicted to the Parliamentary bar, he is ineligible by unwritten rules for promotion to judicial office. There are, however, ample patrimonial compensations for such ineligibility arising out of the cumbrous and antiquated procedure on which Parliament insists. Before any Private Bill can be passed, it must go on the second reading to a Committee, who, in the House of Commons, must of late years, and in view of former abuses, declare, each man severally, that he has no personal interest, and that neither he nor his constituents have any local interest in the matter. The Bill may begin in the Lords or the Commons, according as the appointed Parliamentary authorities may determine; but in any case there is a double trial. The whole work of promoters and objectors, their solicitors, counsel, and witnesses, done at a large expense before a Committee of one House, has to be repeated before a Committee of the other House, as if the previous operations had never been heard of. A failure before either Committee is fatal; and the close of the Parliamentary session brings every Private Bill to an end, and causes the whole work to be begun anew. Sometimes, as in the late notorious case of the Manchester Ship Canal Bill, now the Lords' and anon the Commons' Committee reject the Bill; and it is only after a protracted continuance, at a fabulous cost, of this battledore and shuttlecock play, that both Committees are got at last to agree, and the Bill is passed by both Houses on the reports of their respective Committees. Keeping in view the short hours and intermittent sittings of Parliamentary Committees, it is not to be wondered at if procedure before them, with the attendance of local as well as London witnesses, and deputations of promoters and objectors, is as expensive as can be reasonably expected from amateur and dilatory Courts. A Parliamentary return obtained

in 1886 gives some notion of the enormous expenses attendant upon the present system of Private Bill Litigation, sampled though it is from the rather depressed years from 1883 to 1885 inclusive. During this period there appears to have been expended on Private Bill Legislation by English burghs (London excluded) a sum of £222,163, 10s. 3d.; by English Improvement Act districts, £9903; by English Local Boards, £48,619; by Scottish burghs, £37,345; by Scottish counties, £865; by Scottish police burghs, £3000; and by Irish burghs and towns, £11,827. During 1885 Glasgow spent £11,090 in promoting Bills, and £135 in opposing—total for that year, £11,225. In the same year Edinburgh spent £5800 in promoting legislation, and £39, 12s. 10d. in opposing—total £5830. The chief expenditure, however, was by Railway, Tramway, Gas, Water, and Canal Companies. These companies in England, Ireland, and Scotland spent in Private Bill Legislation, during the three years 1883 to 1885, the enormous sum of £1,448,518. Of this the sum of £1,036,568 was paid by Railway Companies, distributed as follows:—In England and Wales, £849,647; in Scotland, £153,636; and in Ireland, £33,284. Taking England alone, there was spent by Railway Companies in promoting Bills, £419,699; in promoting Provisional Orders, £111; in opposing Bills, £279,774; and in opposing Provisional Orders, £557. There is further for England a sum of £150,000 which cannot be divided. The Scottish Railway Companies spent £101,383 in promoting Bills, £67 in promoting Provisional Orders, £52,120 in opposing Bills, and £67 in opposing Provisional Orders. The expenditure of the Scottish Tramway Companies during the same three years is returned at £9905, of the Scottish Gas Companies at £343, and of the Scottish Canal Companies at £780. These figures, however considerable, are small in comparison with the known facts as to the utterly extravagant weight of capital expenditure upon mere Parliamentary expenses in almost every undertaking of importance, started by Private Act, within the last half-century, from the great railways downwards. Apart from the railways, there is hardly a town or locality in the kingdom which has not to complain either of useful schemes prevented by the mere dread of a Parliamentary contest, or lessened in value to the local public and the promoters by the heavy on-cost charges for obtaining Parliamentary powers. It is not too much to assert that the development of the resources of the country, and the practical trial and application of many new inventions and discoveries, are often prevented, and always greatly burdened, by the expenses of Parliamentary contests under the present arrangements as to Private and Local Bills. The history of the statutory enclosure of commons, by Private Bills, in which the poorer subjects were often despoiled unheard by Parliament, and the prohibitory rates of Parliamentary promotion or opposition in general, all tend to show that Private Bills Committee-rooms

are no place for any but wealthy capitalists, or big public companies or corporations.

What, after all, are the questions in general to be decided by Private Bill Committees? Apart from the adjustment and revision of particular clauses, which may be determined according to Parliamentary enactments, standing orders, or settled practice, it may be said with much truth, that Private Bills involve generally considerations such as the following:—(*First*) Whether the public advantage offered by the promoters is sufficient to justify the compulsory taking of private property, or the compulsory interference with other private rights protected by the ordinary law—in either case, upon due compensation or due allowance for any private patrimonial loss; (*second*) Whether the public advantage offered is such, and so adequately secured by the particular scheme, as to justify the concession of what may be practically a lucrative monopoly to the particular promoters; and (*third*) Whether competitive interests, such as those of existing companies or rival promoters, directly or indirectly affected, should be overruled. There is nothing surely in any such questions which is beyond the competence of a properly constituted tribunal, beginning with all the valuable recorded experience of Parliamentary Committees, and exempt from their hesitancy, as amateurs, to distinguish between relevant and irrelevant evidence and arguments. The questions of public policy, which are supposed to be involved in some Private Bills, are to be decided surely upon general principles, capable of being openly stated and rationally argued, as to which there can be no particular mystery, and upon analogies derived from the best recorded precedents accessible to everybody who cares to read them. Of the impartiality of Private Bill Committees, though this is a quality much more recent in Parliamentary practice than is generally supposed, there is now no question. The advantages of Private Bill inquiries being held in Westminster, remote from local heats and prejudices, though often vaunted, are somewhat questionable. These so-called advantages mean in actual life that a measure, profoundly affecting, it may be, the interests of some particular locality, is removed at the critical stage of its consideration from the knowledge and supervision of the only public, viz. the local public, which knows or cares anything about it. Erroneous evidence, or unfounded proposals, which would have been instantly detected and exposed if offered before a watchful local public opinion, may, and in constant experience do, largely affect the decision of Private Bill Committees unacquainted and unconnected by their very constitution with local peculiarities. If, indeed, there could now be anything approaching jobbery in Local Private Bills, it might well seem that no better device for facilitating jobs could be suggested than that such Bills should all be negotiated and conducted in London, as far as possible away from the people who are interested, and

whose rights may be largely affected by new clauses, or changes in particular clauses, without their really knowing or hearing of the matter until it is too late. The impartiality and the vigilance of Private Bill Committees cannot protect local views and interests not specially represented before them, so well as the appearance of critics and objectors before a less expensive local tribunal would. Nor is the fact that the non-official members of these Committees are individually unpaid for their work, any security that they do their duty more efficiently than a paid commission would, but rather the contrary. Moreover, though individual peers and members of Parliament are not paid for their amateur services on these judicial or semi-judicial Committees, it is too much of a joke to assert or imply that Private Bill Committees are a wholly gratuitous tribunal. It is difficult, from the want of continuous records, even for Mr. Clifford, in his most instructive recent book on Private Bills, to get at the House fees of Lords and Commons for Private Bills. The fees in both Houses on such Bills have been somewhat reduced in late years; but it is known that in 1845, when the Commons' fees on Private Bills were transferred to the Consolidated Fund, there was a sum to the credit of the fee fund, after paying all expenses, of £220,000, which was applied by the then happy Chancellor of the Exchequer to public uses. In the great railway year of 1846, the Commons' fees for Private Bills amounted to £201,643—a tolerably handsome sum for the labours of an unpaid tribunal. During the ten years from 1853 to 1862, the total Private Bill fees received at the House of Commons amounted to £541,489, being within about £5000 a year of the whole establishment expenses of the House, including the salaries of the Speaker, Sergeant-at-arms, and Clerks. In 1863, the estimate voted for the House of Commons establishment was some £58,485; and the Private Bill fees defrayed the whole of the expense, and left a balance to the Consolidated Fund of £8129. The Lords' fees on Private Bills are still more difficult to state than those of the Commons. For fifteen years, between 1812 and 1826, the Lords netted the fairly substantial sum of £217,576 upon Private Bills. In 1882—the most recent year in which, from existing and available information, the fees of the two Houses can be compared—the Lords had £40,878 and the Commons £45,795 from Private Bill fees. The policy of handicapping industrial and local enterprise by such heavy fees may be questioned; but in the face of such considerable sums paid by suitors for the privilege of being heard by Private Bill Committees, two obvious reflections cannot be omitted—viz. (1) That the Parliamentary tribunals are considerably more costly in Court fees than the ordinary Courts; and (2) That it only requires a portion of these Private Bill fees in order to endow the country with, and to relieve Parliament by means of, a properly paid Commission, adequate to discharge, in due

business-like fashion, all the functions of inquiry and reporting presently laid upon Private Bill Committees. The vested interests of the Chancellor of the Exchequer in Private Bill fees will assuredly not stand in the way of this change, should it be found a public improvement. The private interests which have grown up around the existing arrangements, and the vital disinclination of every corporate body, even though it be so exalted as the Imperial Parliament, to part with any of its powers or influence, are more likely to be hindrances to any change. It is probable, too, though strange at first sight, that some of the very victims of the Private Bill system in the past, such as the great railway companies, are likely to oppose any transference of Private Bill inquiries to a Commission. It is their possible rivals who would now be exposed to heavy Parliamentary expenses, and the existing companies, with the usual consciences of corporations, do not wish to see the business of promoting or objecting to Private Bills made more cheap or easy for others than it was in the past for themselves. The Scottish railway system, no doubt, has its connections in England, and is conducted with much competitive keenness and spirit as regards both the local and through-going traffic; but there hardly seems to be any peculiarity in the position of any of its lines which is not quite as capable of comprehension by a Parliamentary Commission as by a Parliamentary Committee; nor any peculiar sacredness in Railway Bills to justify their separate treatment from other Local Bills. From the point of view of the public interest, the objections to the present arrangements as to Private Bills apply as strongly to the promotion of, and opposition to, Scottish Railway Bills, as to any other Private Bills affecting Scotland.

(To be continued).

TRIAL BY JURY IN CIVIL CAUSES.—II.

(Continued from page 38.)

THESE are the main advantages which are put forward in favour of the system of trial by jury in civil causes. In considering them briefly, the disadvantages of that system will become sufficiently apparent. No doubt "common-sense and knowledge in the world" are the *sine quibus non* in a man who would pronounce a judgment on questions of fact. But what precautions are taken under the jury system to ensure that these requisites shall be present in the jury? There is not even the pretence of any such precautions, and the jury is chosen by lot from a number of householders, who may be, for ought that the law provides, a set of eccentrics or recluses. What is the result? One frequently sees a jury composed of honest, simple men, who come from the class most easily imposed upon and swindled. A specious and

plausible witness, whom judge and counsel see through, may carry the day with such a jury, and in that case the unfamiliarity of jurors with the process of detecting deceit leads to legalized injustice. Again, jurymen of all classes are apt to be swayed by sentiment in their decision. Sentiments of sympathy for the poor and the injured are all very proper and admirable in private life, but they are utterly out of place in the decision of a question of legal liability. Yet it is well known that even shrewd business men confess to being influenced by such sentiments in their verdicts. So it frequently happens that a wealthy defender, however good his legal defence in the eyes of trained minds may be, is found liable in damages to his opponent, in order to gratify the feelings of sentiment and charity in the minds of sympathetic jurymen, to whom, certainly, it is an inexpensive method of indulging in the luxury of benevolence. The very multiplicity of sympathetic hearts frequently renders impossible the common-sense verdict which is expected from a multiplicity of heads. This is an evil which is irremediable under a jury system. Unless the verdict is so flagrantly opposed to the balance of evidence, as to render it out of the question that a rational jury could return such a verdict, it is impossible for the losing party to obtain a new trial. By their general verdict the jury may, if they choose, disregard the judge's advice, and give a decision which no judicially-minded man could defend.

As to the argument that a jury is more amenable than a judge to public opinion, it is one that need hardly be stated now-a-days. We do not live in arbitrary times, and any illegality or oppression on the part of a judge would render him amenable (in substance if not in form) to our democratic House of Commons. Similarly the advantage claimed for jury trial, that it enables a decision to be given while the evidence is fresh in the minds of the jury, is out of date. It refers to a time in Scotland when judges did not hear evidence orally, as they now do, even when they sit without a jury. The statement that jury trial saves time and expense will not be readily admitted by any one who has had much experience of litigation. It is true that the statement receives a certain amount of support from the fact that a sound verdict cannot be set aside. But after all, finality is a creature of statute, and could easily be applied to other cases. Indeed it is so applied. Take the case of a simple question of fact tried by a Sheriff-Substitute. The decision may be appealed to the Court of Session either directly or after a prior appeal to the Sheriff-Principal; but it cannot go beyond the Court of Session, for no case brought in the Sheriff Court can find its way to the House of Lords except upon a question of law. Contrast the two systems. In the one case you have a verdict by a jury of "common-sense and knowledge in the world" in the Court of Session. In the other, you may have the judgments of a Sheriff-Substitute, a Sheriff-

Principal, and four Lords of Session, skilled minds, who carefully weigh the evidence. As regards time, the latter process may not be quite so speedy as the former, though neither can be called tedious; but in the matter of expense, in the vast majority of cases, the Sheriff Court process is very much the more economical. When to economy is added the satisfaction of having had skilled minds engaged in sifting the evidence on which a decision is required, it does not seem as if there could be much room for doubt in choosing a tribunal. But as the jury is the more uncertain tribunal, it is just for that reason the Court most sought after in shaky cases. In the opinion of the "considerable minority" of the Commissioners already referred to, jury trial in civil causes operates "prejudicially to the lieges as well as to the Court. Actions of a kind which should never be instituted are thereby encouraged, and parties make compromises or references, and even entirely abandon good and important claims, and yield to bad and unfounded claims, rather than risk a jury trial. They do so because the tribunal is unsuitable, and therefore hazardous, and because jury trials are always very costly, are seldom satisfactory, and in various classes of cases lead to verdicts which are erroneous, and often the result of sympathy or feeling." The report further alludes to the inconvenience and cost entailed when a new trial is rendered necessary on account of any serious mistake made by the judge in law, or by the jury in the application of the evidence in their verdict.

It is notorious that in Scotland lawyers who value fair play almost universally condemn the system of civil jury trial. Some judges have a leaning to it, because it relieves them to some extent of the task, often very difficult, of balancing evidence as to facts. But every lawyer who has any experience of juries knows that nothing is so impossible to forecast as a verdict. When a case is tried by a judge sitting alone, a rational man may form some opinion as to the probable result, because he knows that the judge will endeavour to apply the ordinary rules of evidence to the facts elicited. But the laws which regulate the production of verdicts by juries are not so clearly defined. There is, indeed, a certain formal respect paid to the rules of evidence, but in the application of these rules an amount of distortion is often visible, due to certain fairly defined prejudices in the minds of jurymen, which are well known to old jury hands. This leads us naturally to notice two further disadvantages which Lord President Hope suggested in his address to the Courts, on 12th November 1825, when the Judicature Act came into operation. One can easily see that many of the disadvantages we have noticed would not exist in early times, when parties pled their own cause, and juries were already familiar with the facts. But when advocates came to be employed, the possibility arose that juries might be influenced in their verdicts by the wiles of skilful pleaders, who are

familiar with the weak points of such a tribunal. "The verdict," said Lord President Hope, "ought to be, as the oath of a jurymen bears, according to evidence, and nothing else; and therefore, if counsel hope to obtain, by their eloquence, a verdict different from what the evidence itself would warrant, they are pronouncing a more bitter satire against trial by jury in civil causes than ever was uttered by its bitterest enemy." Yet if counsel does his duty in putting his client's case as favourably as he can, it is unavoidable that this satire should be pronounced on the occasion of every jury trial. That it is a real danger is shown by the number of new trials which are granted because verdicts are irrational. The other disadvantage pointed out in the same address is certainly of considerable importance to the country at large. "When it is considered that our constitution provides a set of professional judges, who are paid for administering justice to the people, it certainly is a great and anomalous inconvenience that the most trifling causes, often originating in mere bad humour, and in which not an atom of property is in dispute, cannot be determined without taking away from their own business twenty or thirty industrious people who have no manner of concern or interest in the parties or their dispute." This is a genuine grievance to-day, and surely some very strong ground should be shown for continuing our anomalous civil jury system, when it entails such inconveniences without any compensating advantage.

But the argument on which the supporters of jury trial in civil causes especially rely, is the unassailed position of jury trial as a means of deciding criminal cases. They say, very truly, that there is no serious proposal to abolish jury trial in criminal causes, and why then should it be abolished in civil causes? Now it is plain that the inherent disadvantages of jury trial must display themselves, whatever be the nature of the case tried. But criminal cases possess this characteristic, that in them these disadvantages are reduced to a minimum, and counterbalanced by weighty considerations of public interest. In the overwhelming majority of criminal cases the facts brought out in evidence are not intricate, and the issue put to the jury is of the simplest possible description, involving in the answer a simple Yes or No. In spite of the theory of law, that questions of fact alone should be submitted to the jury, cases inevitably arise in which fact and law are so blended that it is hardly possible to put the issue simply. But for once that this occurs in a criminal case, it occurs fifty times in a civil case. In a criminal case the issue usually is of the simplest possible description: *e.g.* On the evidence did the prisoner steal the articles libelled? In civil cases, on the other hand, questions of intention, of malice, of responsibility, of negligence, are commonly involved, which even to a trained mind are difficult of decision. Hence the awkwardness frequently experienced in civil cases of requiring untrained minds to judge on

an intricate issue is hardly ever experienced in criminal cases, and thus one of the most pressing arguments against civil jury trial is not practically available against criminal jury trial.

There is, too, scope in criminal trials for those feelings of sympathy and sentiment which are universally found to actuate juries powerfully. In a civil case, for instance, the secret of a verdict may be this, that the jury is averse to saddling one or other of the parties with the expenses of the trial. In criminal cases no such consideration can enter. The issue is not a personal one between A and B, but between the impersonal State and the individual. Accordingly juries in criminal cases have not to weigh the evidence as between two individuals, with the risk of doing injustice to one party because the other has accidentally secured their sympathy; but they have simply to consider the conduct of one person with reference to its law-abidingness or the reverse. If he secure their sympathy, it is not at least at the expense of another litigant that they give it play. In individual cases they may indeed do injustice to the cause of law and order; but the love of order, if it have any worth, must be far too firmly implanted in the minds of citizens to be shaken by an eccentric verdict. Besides, the whole theory of our criminal law is, that it is better for ten guilty persons to escape than for one innocent person to suffer. The rule that penal laws must be construed in favour of the accused, is one singularly fitted for being applied by a jury. In a normal jury you may safely allow feelings and sentiments to have full play, since the real question for their decision is whether an offence has been committed against the substance and the spirit of those laws which secure peace and order to the State. In view of the genius of our criminal jurisprudence, it is rather an advantage than otherwise that in deciding criminal cases full scope should be given to those feelings of humanity which sway society.

These considerations help to show why it is never proposed to do away with jury trial in criminal cases, and indeed it may be added that its abolition would entail the institution of a series of Courts of Criminal Appeal, which would deprive our criminal system of one of its present outstanding merits—that of striking speedily at crime. It may be urged that at least the hardship to jurors is alike in civil and criminal cases. The inconvenience may be the same, but it is outweighed in criminal cases by greatly compensating advantages. In criminal cases jurymen are fulfilling a public duty in aid of the work of government as indubitably as when they are paying income tax, or voting in the election of a member of Parliament. In civil cases they are simply acting under compulsion as arbiters, in return for what usually is very inadequate remuneration. In those private disputes which form the subjects of civil actions, society is interested only to the extent of securing a just decision, and it provides for this in the careful selection of

good judges. But in every criminal case, society, and every member of society, is directly interested, because it is a quarrel between the recalcitrant will of one citizen and the united will of the State, in which it is to the advantage of every member of the State that the State should be victorious. Accordingly the criminal jury represents society in its collective and impersonal capacity, pronouncing on offences committed against the laws on which society is founded. It is true that the judge pronounces sentence, in this representing the majesty of the State; but it is the prisoner's fellow-citizens who say, by their verdict, whether he is worthy of punishment. It has been found in the interests of freedom, and it is a fixed principle of our constitution, that a man shall not be deprived of life or liberty except upon the verdict of his peers. So, for reasons of State policy, criminal jury trial, even if it had many more disadvantages than it has, might still be a necessary institution. But it has never been a fundamental principle of our constitution that arbitration between individuals as to their private rights should be conducted by the peers of the parties. Our whole civil system of jurisprudence is a standing proof to the contrary. Accordingly it is idle to draw any inference from criminal jurisprudence as to the propriety of continuing the present system of jury trial in civil causes. It is an institution alien to the Scottish judicial system. It has been weighed in the balance, and found wanting. One can only express surprise that steps have not been taken long ago to do away with it, as being a costly, ineffective, and injurious part of our legal system.

Only one consideration suggests itself with reference to such a reform. There might be a disinclination to hand over to the decision of one judge such cases as those which at present go to a jury, on the ground that provision is not made for securing the common-sense verdict, which is obtained from consideration of a case by several minds, unless the parties incur the expense of an appeal to a higher Court. This is an objection of considerable force. Of course finality may be prescribed by statute to take effect at any stage of such cases, but probably such a remedy would not be accepted as suitable. The direction in which one more naturally looks for a solution of the difficulty is to the appointment of skilled assessors, as in nautical cases or patent cases. It may be replied that this would just be the jury system over again. Not so; for it would enable us to secure "common-sense and knowledge in the world" in these assessors. There occurs to us a suggestion which may be worth consideration. It seems reasonably certain that a Private Bill Commission will ere long be appointed for Scotland, composed of a legal authority, and two or three men of practical skill. It will, in fact, perform the functions of a jury in relation to all Scottish Private Bills which come before Parliament. Could this body not be substituted for the Jury Court? No doubt, as Lord Swinton says, "a per-

petnal jury of established judges is a contradiction in terms," but we do not need to call it a jury. Cases at present appropriated to jury trial would be prepared in the Court of Session as they now are. Issues would be unnecessary, for the trial could take place on the closed record. When the day of trial came, the judge before whom the case had been called would preside, and he would be assisted by the lay members of the Private Bill Commission. No appeal would be allowed except on questions of law, which would be decided by the Inner House as at present, and without the assistance of the assessors. Thus it would not be permissible to overturn a verdict as contrary to evidence. This is the bare outline of a scheme which, it appears to us, would give all the advantages of trial by jury, with as few as possible of its drawbacks. In fact we desire to substitute for Trial by Jury, Trial by Commission.

AN IRREGULAR MARRIAGE.—IV.

(Continued from Vol. 31. p. 644.)

I LIFTED the lid, and saw a covering of old newspapers loosely folded over something. These I pulled away, and there lay before me, in the bottom of the box, a human skeleton! I must have given a sudden start back at the sight, for my elbow knocked over the candle, and "in an instant all was dark." All, too, was still, but for the beating of my heart, which was thumping like a piston. The match-box! Where was that? On the dressing-table. I made a detour to avoid the box, and knocked my foot against the wardrobe. It must have been a sharp knock, for I found afterwards that my foot had bled a good deal, but at the moment I hardly felt the pain. After knocking over several articles, which fell on the floor with a hideous clatter, I at last got hold of the match-box, and my heart almost stopped, for at first it seemed that the box was empty. But no, I was mistaken. There were three matches in it. I tried to strike one. It burnt blue for a moment, without illuminating the room, and then went out. Missed fire! Two—a blue glare again, and then darkness as before. Somebody seemed to blow them out just when I had struck them. Three—my last match! My hand shook as I pressed it against the box. Again there was a momentary blue glare, and again I was alone with the darkness, the skeleton, and—! Somebody had certainly blown it out this time! I thought I felt a cold breath on my face. Shivering with horror, I groped towards the door. But I was pulled up by something catching hold of the corner of my nightshirt. There was no longer room for disguises. With a wild scream I turned sharp round, to find that I was free again. Then I rushed to the door. But the bolt was a difficult one, and my fingers were numb and useless. A

dozen times I tried it, but to no purpose; I could not draw the bolt. Now I thought I heard somebody breathing hard behind me, and a cold breath seemed to fall upon my neck. Ceasing to try to draw the bolt, I simply yelled with horror, and beat frantically with my hands against the panels of the door.

It was not long ere, to my infinite relief, I heard sounds of commotion outside. There were responsive screams from several quarters, and the sound of voices and hurrying feet in the passages. It was some minutes, however, before any attempt was made to relieve me, for as every visitor in the inn had begun shouting or screaming, it was some time before the hotel people could discover where was the "real original" distress. At last, however, outside, attention was directed to my door, and a voice demanded, "What's the matter there?"

"Murder, murder," I shouted; "stave in the door, there's ghastly, grimy murder in this room."

I was leaning against the door now, my hands spread out over the panels, but suddenly I found myself lying on my back on the floor. Some heavy person had flung himself against the door with all his might, and the shock had knocked me over on my back, but still the bolt held. I did not attempt to rise, but sat still on the floor, whilst several more furious assaults were made upon the door, all to no purpose. At last there was a sound as of consultation, then a pause for a minute or two, and then "One, two, three," a tremendous crash, and the light streamed into the room. The bolt still held, but the hinges had given way. They had smashed in the door with the mangle roller. A dozen pale eager faces peered into the room. There were six male guests, three ladies in deplorable *deshabille*, the landlord and several hotel servants. I can hardly have looked a dignified object; I fear I scarcely did credit to the bar of Scotland, as I sat there on the floor, frantically huddling my skirts over my knees as I recognised the presence of ladies.

"What's the matter?" was the first question that assailed my ears from a dozen mouths.

"I—er! really don't know—ah!" I began, for I was getting confused, and I hardly knew myself what was the matter. I got no further, for I was interrupted by a storm of imprecations from every male in the party. My foot, as I have stated, had been bleeding, but this was hardly adequate to account for the unanimity and heartiness with which the whole company attributed to me a sanguinary character. The host was particularly vehement.

"Ye bluidy bletherin' lawyer body, ruinin' an honest man's hoose," he was proceeding, but by this time I had gathered myself together.

"Look you here, you hoary old iniquity," I began, "look in that box, sir; look in that box, gentlemen; ladies, though this is an

unmarried man's room, I invite you to come and look in that box. I appeal to you all whether the discovery of such an enormity, by an innocent stranger, under his very bed, does not amply justify this disturbance?"

The discovery of the skeleton provoked an extraordinary reaction in my favour. The general indignation was at once diverted from my head to that of mine host. "It was monstrous that a respectable and peaceable gentleman should be disturbed by finding a ghastly outrage like that beneath his very bed." "They would leave the house, they would: first thing in the morning." "This whole matter would be exposed in the London Society papers; it would ruin the hotel," and so on. The innkeeper was quite overwhelmed, and protested his shame and regret, though he was too honest to pretend that he did not know before what was in the box. It appeared that a local doctor was in the way of letting his house in autumn, and taking a small room in the hotel. The skeleton was his property, and, not caring to leave it to the care of his holiday tenants, he brought it with him to the hotel. His bedroom was small, and his bed a very low one, so he prevailed upon the landlord to allow him to stow away the box in the adjoining room, which happened to be the chamber that fell to me. Hence the offence! To-night the doctor had been called away to attend a patient at a distance, so the host had to bear the whole weight of the general abuse for the outrage that had been committed upon me, and the consequent disturbance of the repose of his guests. But gradually the clamour died away, as one by one the angry visitors betook themselves to their respective rooms. The trembling host offered to have the skeleton carried out to the stable. I told him he might carry it to Khiva if he pleased, but I was not going to sleep in that room again; so I dressed, and went downstairs to the coffee-room, where I dosed on a sofa until the servants came to sweep out the room in the morning. Then I went for a walk up to the Devil's Mill.

At half-past eight I returned to the inn for breakfast. My good-mornings to the ladies were a trifle embarrassing; but we got over that, and I found that the incident of the night before was the all-absorbing subject of conversation. The general indignation, however, had now cooled down. Of course everybody, especially in addressing me, expressed disapproval of the surreptitious intrusion of such an unwelcome visitor into a stranger's bedroom, but I was painfully conscious that, now that daylight had supervened, there was an inclination on the part of several of the company to treat the incident with unbecoming levity.

After breakfast a card was handed me, and I was informed that the doctor requested an interview with me in the billiard-room. I found, of course, that he desired to tender his humble apologies for the disturbance of the previous night. At first I daresay I was exceedingly stiff, but the apologist was so con-

trite, and so obviously vexed, that my ill-humour soon thawed, and I entered into some general conversation with him. The doctor was a bright, pleasant little man, of middle life, evidently somewhat of an enthusiast in medical and other matters, but with a touch of affectation and pedantry in his manner which showed itself in the use of the now almost obsolete practice of Latin quotations in general conversation. Whilst talking with the doctor, it occurred to me that there was nobody more likely than this bustling, well-informed man to give me information in the matter that brought me to Comrie. So, after leading the conversation up to the subject of the weather in the district during the winter, I casually inquired if he had ever known of anybody being lost upon the hills.

"*Infandum, Regina, jubes renovare dolorem*" — that unlucky skeleton, the *corpus delicti* itself, was found upon a hill half-a-dozen miles from here, last spring. How it came there, or how long it had lain, I can't tell, for there was nothing to identify it by, and nobody from the district has gone amissing for many years back."

"Indeed! and where was it found?"

"You know Ben Chonzie?"

"Yes."

"Well, it was found among the rocks on the Glen Turret side, fifty or sixty yards below the brow of the summit. As nobody claimed it, I was allowed to keep it. '*Hinc illæ lachrymæ.*'"

This was intensely interesting, and I questioned the doctor minutely, but his information hardly went further. The bones had been found by a shepherd, bleaching among the stones. A keyless gold watch, without inscription, was hanging in the hollow of the chest, the chain having caught on one of the ribs. There was a ring on one finger, and some silver was found lying near the left thigh bone. There were, too, some fragments of cloth and a number of buttons lying about. From these circumstances, as well as from some tissues still adhering to the bones, the authorities and the doctors who made the *post mortem* concluded that death must have taken place within a year or two before the discovery of the remains. There was a fracture in the skull sufficient to account for death, and several of the finger-joints and one shoulder were dislocated. I got from the doctor the name of the shepherd who discovered the remains, and I ascertained that he was still at Invergeldie.

Early in the day I hired a trap, and drove up to Invergeldie. I found that the shepherd I wanted was out; but this did not disappoint me much, for I had rather a fancy to examine the hill-top alone, and find out what I could for myself. In less than an hour I was on the summit, and I made at once for the eastern edge. Without difficulty I found the place I had thought of as being recalled to my memory by Mrs. Stewart's sketch; but, before taking the sketch from my pocket, I looked carefully to see if

there were any signs by which I could positively identify the scene. I fixed on three things in view as characteristic features not to be readily mistaken. On the left there was a projecting rock, with a singular resemblance to a bear stretching out its neck in the act of rising. In the foreground, just in front of me, there was a large round boulder, flat on the top, with a smaller boulder of a similar shape on the top of it again, very like a variety of bread loaf which used to be much in favour, and may be so still, though I seldom see it. On the right, just below the edge of the precipice, there was a curious projecting fragment of rock, like a bullock's horn, pointing downwards. Having fixed upon these as the most distinctive landmarks, I took out my pocket-book, and unfolded the sketch. Yes, there could be no doubt about it. There, very slightly drawn, but as accurately outlined and relatively placed as though they had been photographed, were the bear, the bread loaf, and the bullock's horn. The dreamer's eye must have taken in the scene from the very spot where I was standing. I next went forward, and very carefully examined the edge of the descent beneath. It was not quite a sheer precipice, but anybody thrown violently over would hardly have been arrested before descending 80 or 90 feet, and would certainly have been terribly bruised and broken amongst the boulders and projecting rocks. I tried to judge as accurately as I could the spot where the descent of a person falling over from the place on the edge indicated in the sketch would be arrested, and, having settled upon the place I deemed the most likely, I made a detour, and scrambled down and along until I reached it. The ground was thickly strewn with loose stones of all shapes and sizes, and at first I could see nothing to indicate whether my surmise was correct or not. But at last, on a stone much larger than any of the others, I noticed something that fully confirmed my conjecture. A good deal washed away by the rain, but still plainly discernible, there was the tracing of a cross upon the stone, made apparently with sheep dip or some other viscous substance. Doubtless some of the shepherds had made this mark on the spot where the remains were found, either out of sentimental feeling or to be able to identify the place again in case of further inquiries. I turned over many of the stones, but for long I could find nothing to indicate that on this spot human remains had so lately seen corruption. At last, however, my search was rewarded by several small discoveries. In quick succession I came upon a metal button, on which the name of a Glasgow tailor was still legible, a rusty brace buckle, a tarnished sleeve link, and a fourpenny bit. I could find nothing more, though I turned over every stone within four or five yards of the spot. There were, indeed, two stones which I was unable to turn,—the large one with the cross upon it, and another beside it. Between these two stones there was an opening of about half an inch wide, down which, as I thought, something might have

slipped. At last, by using a long splinter-shaped stone as a lever, I managed with much difficulty to displace the smaller of the two stones. There was a flat brown object, which at first I thought was only some crushed moss, lying between them. I lifted it carefully, and found that it was, or once had been, a leather pocket-book. The stitching was all completely rotted away, and I was afraid to handle the thing lest it should collapse into shapeless pulp or mould in my hands. Very carefully I placed it in a large envelope I happened to have in my pocket, and as there was now nothing to be made of further search about the spot, I wended my way down the hill.

With admirable fortitude I curbed my impatience until I had returned to Edinburgh, and was able to make the examination of the pocket-book under the most favourable circumstances. I found that the pocket-book had a large inner pocket on each side, and on the one side there were, besides, one or two smaller pockets, as for stamps or cards. Between the outer folds, but not in either pocket, there was a letter in an envelope. In one of the smaller pockets there were the remains of some postage stamps, in another there were a number of calling cards, on some of which the name George Stewart was still clearly legible. The third small pocket contained only half a railway ticket return, apparently from Stirling to Glasgow. In one of the larger pockets there was a Bank of England five pound note, six Clydesdale Bank one pound notes, all in fair condition, a blank Clydesdale Bank cheque, and a photograph, apparently of a lady, and with the name of an Exeter photographer still legible on the back of it. In the other larger pocket there was a game licence, still fairly legible, some court plaster, an illegible newspaper cutting, and a prescription, on which the invocation and the word "bismuth" alone were legible.

But by far the most important discovery for my purposes was the letter between the outer folds, and unfortunately this had suffered much from the action of water. The envelope was unstamped, and appeared not to have passed through the post, and never to have been closed. The address was quite illegible. The letter itself was a single sheet of notepaper, written upon three pages. It appeared to have been written by Stewart, but never despatched. Probably he wished to consult young Marshall before sending it. With infinite pains I managed to gather the gist of a portion of the contents. My reading of this portion was as follows, the words and letters in Roman characters alone being legible, those in italics being supplied by conjecture :—

“ ——— Street, Glasgow,
Sept. 1875.

“Mr. John Scraggs.

“Sir,—I am *astonished* to find that the document you handed me is not what I asked for and *what* you represented it to be—the

original *declaration* of my *marriage* with Miss Havelant, but *only* a copy of *the* same, and *even* that *copy* a garbled one. This is *only* in a piece with *your whole* conduct in *the* matter, and . . .

“As to the £1500
unless . . . three days . . . will
be reported to the procurator-fiscal . . . my ultimatum.

“I am,

“Your obedient *Servant*,

“*George Stewart.*”

This letter was extremely vexatious and disappointing. It was clear to me that the declaration of marriage was referred to, and that that document was still in Scraggs' hands, but there was not a legible word in the letter that served to identify the document. John Scraggs seemed still to be master of the situation. But I was determined to try a fall with him. I have frankly indicated in this narrative that I don't like skeletons under my bed, or anything of that kind. With the ghostly I am “*nie zu Haus* ;” but before real flesh and blood I don't quail. I cannot boast as some one once boasted, that I fear neither man nor devil. But bar the devil, and I am on!

I knew that Scraggs worked at his office late at night, and it occurred to me that at night, when he was alone, was the most favourable season for the full operation of those terrors with which I purposed to assail him. Accordingly, one evening between nine and ten o'clock, I betook myself to his office in Young Street. An old crone who kept the rooms admitted me, and I knocked at once at the door of Scraggs' room. Invited to “Come in,” I opened the door, and stepped into the chamber. Scraggs was seated at his desk, busy poring over some papers. On seeing me, he started up, and invited me to be seated, with an air of interested expectancy. I fancy that Scraggs was not altogether unaccustomed to visits of this kind, under cover of the night, from people of a social position much superior to that of the ordinary run of his clients, who had got themselves into scrapes which they were ashamed to explain to their own solicitors. No class of clients could be more welcome to Scraggs. They were generally substantial, and he might fleece them as he pleased, unrestrained by any dread of the pruning pen of the auditor.

“Well, what can I do for you to-night?” inquired Scraggs, when I was seated.

“I called,” I began very deliberately, “about a matter of some delicacy, in which I am interested.”

“Indeed, I hope I can be of some service to you,” replied Mr. Scraggs, and his eye glistened with eager expectancy.

“I have no doubt you can, sir, for the matter is one with which you are thoroughly conversant.”

"It concerns a lady?"

"Yes, a lady whose case you fully understand."

For a moment, but only for a moment, Scraggs looked puzzled, but his theory was quickly formed. I was under the impression, he thought, that some female who was blackmailing me was in his hands. This was a mistake, but to John Scraggs such a mistake was a trifling detail.

"Yes, yes, of course; there's a woman at the root of every trouble," he replied, with a familiar leer in his face. "I quite understand the matter,—a very disagreeable case, no doubt, but possibly—I won't, I can't say more—*possibly* an extra-judicial settlement may be arranged which will save the exposure."

"'Exposure' is hardly the word, Mr. Scraggs; it means something more than that."

"Well, well, of course,—a professional man's reputation is his bread and butter, we all know that."

"This is not quite a matter of bread and butter, Mr. Scraggs; it's much more likely to be a matter of bread and water."

"Dear me, dear me!" and Mr. Scraggs looked puzzled again.

"I don't wonder, Mr. Scraggs," I continued, "that you desire an extra-judicial settlement. You'll be a lucky man if you get one."

"Me?"

"Yes, *you*, Mr. Scraggs, and you'll better understand me when I tell you that I've called with reference to the affairs of Mr. George Stewart."

At the words the light faded from Scraggs' eyes, his jaw fell, and his countenance darkened.

"Oh, if that be so," he replied, in his surliest tones, "I'm afraid you may spare yourself the trouble. I thought I had given you clearly to understand that I have Mr. Stewart's imperative instructions to give no information."

"But I speak, sir, on behalf of one who has an imperative right to demand information whatever may be your instructions."

"And who may that be?"

"Mrs. George Stewart."

"I don't know any such person."

"Well, I won't quarrel about names. You know Miss Havelant?"

"No, I don't know Miss Havelant; and Miss Havelant has nothing to do with me."

"It would have been fortunate for herself, I daresay, if she never had had anything to do with you; but you have in your possession a deed embodying a declaration of marriage between her and Mr. George Stewart, and you'll hand that deed over to me before I leave the room."

"Declaration of marriage!" exclaimed Scraggs; "I never heard of such a deed."

"I am not going to discuss the matter with you, Mr. Scraggs. I demand the deed."

"Demand the Devil!" said Mr. Scraggs, throwing himself back in his chair with insolent defiance, and kicking violently against the under side of the table.

"No, Mr. Scraggs, not in the meantime. For the present I'm content to allow that gentleman to appear by his procurator. Come, hand me the deed."

"I'll hand you to the door," replied Scraggs, with extreme insolence. "A pretty fellow, meddling in affairs with which you have no concern. Mr. Stewart was quite right to warn me against you."

"Ah, come, this is something new; when did this happen?"

"The very last time I saw Mr. Stewart."

"Indeed, on the very summit of Ben Chonzie?"

I had fixed him with my eye, and at the sound of the words "Ben Chonzie" every particle of colour left his face, his whole frame quivered, a curious gulping motion began in his throat, which soon became so violent, that I thought he was going to choke. His features grew livid, and his eyes were almost closed. I have never seen a more repulsive sight. At last, however, and though it appeared long, I suppose the convulsions had not lasted more than a few seconds, he pulled himself together with a tremendous gulp, and in a tone of surly defiance demanded, "What do you mean, sir?"

"Look here, Scraggs," I replied, rising to my feet, and planting myself deliberately in front of him, "I may as well tell you at once that the game is up. I know all about it—all about the fifteen hundred you appropriated—all about the garbled copy of the marriage declaration which you tried to palm off as the original—all about your visit to Comrie, and what happened on Ben Chonzie."

"Happened on Ben Chonzie! What do you mean?—what do you mean?—what do you mean?" shrieked Scraggs, in fierce excitement, as he leant forward in his chair, and ground his teeth, as though he were about to spring at me. I had been drawing from my pocket Mrs. Stewart's sketch of the scene on the hillside, and I now brought it sharply straight in Scraggs' view.

"That's what I mean."

Scraggs gazed for an instant at the sketch, a look of horror crossed his face, which was hidden in a moment by his throwing his hands over his eyes, as he fell back shuddering in his chair. For a moment or two he lay trembling, shivering, and twisting himself as though some one were teasing him with a hot iron; and then, at last, he broke forth into a flood of bitter weeping. I daresay these were the first tears the old scoundrel had shed since he got his last hiding at school forty years before.

I let him cry for a minute or two, and then I began again with

harsh deliberation. "Will you go to the police office, and surrender yourself? or will you wait, and be apprehended here?"

At these words the sobbing ceased, and he threw himself forward again in his chair, his hands outstretched in piteous entreaty.

"For God's sake have mercy upon me. For God's sake don't give me up. I'll do anything—anything you want. Have pity on my poor wife."

(Scraggs then had a wife. I had not thought of that, although, by the way, I knew he had a son. It has often puzzled me. There seems to be no depth of depravity but what some woman will be found to go down to it. I have often thought it proof of the finitude of the Devil, that he has never made a man so bad that no woman could be found to take him.)

"Well," I replied, "first of all, hand me that deed."

"And will you hold your tongue if I do?" inquired Scraggs, with something of his old cunning returning. I recognised the danger of any parleying, lest the effects of the first horror should wear off, and he should reflect upon the improbability of there being any legal evidence against him.

"Look here, sir," I replied sharply and decisively, "hand me that deed, and agree to quit the country in three days—or the Calton gaol to-night!"

"Three days! give me three weeks to wind up here."

"No; only three days. Come, I won't haggle. Shall I call a policeman?" and I made a move towards the door.

"Stay, stay," he shrieked, "I'll agree to anything. See, here, *here's the deed*," and he opened a charter-box. The deed was in my hands; but, mindful of George Stewart's experience, I looked at it carefully, to satisfy myself it was the original. I had read it through, and was scrutinizing the signatures, when suddenly I received a shock that would have knocked me over had my back not been against the table, and I was sensible of violent constriction at the throat. Scraggs had thrown himself upon me with the fierceness of a wild cat. I was pinned in the most extraordinary manner, for he had passed his hands under my armpits, and seized me by the throat. My shoulders were thus held in a vice, and my arms so foreshortened, that I could not deal an effective blow. The small of my back was pinned against the table, I was bent back nearly off my feet, and Scraggs' own feet were firmly planted against a large chest, which gave him enormous purchase. His face, too, was buried in my chest, so that I could not hit him in front. I made one or two desperate efforts to free my shoulders, but the man possessed extraordinary strength, and held me like a vice. There was a ruler on the table, unfortunately a small one, but it was the only weapon at hand. I seized it, and began hammering, with all the reach I could command, on the back of my assailant's head. But the terrible compression at my throat was maintained. I knew it was a matter between us of simply

lasting longest. No man could stand these blows upon the head for many seconds, and my respiration was all but suspended. My head began to swim, the room seemed to whirl round me: then things grew darker and darker. All was black for a moment: then there were bright shooting lights, red and blue, and I heard the distant sound as of mocking laughter. But of the outer world two facts of consciousness still remained, that feeling of terrible compression at the throat, and the persistent sense of the necessity of maintaining that pump-handle motion with the hand. I was like a towering partridge. Every sportsman knows a towering bird. It goes away often as if it had not been touched by the shot. But gradually it separates from the covey, and its flight becomes groggy for a moment; then it steadies itself, and flies higher and higher, until at last it is flying almost perpendicularly upwards; and then suddenly the flight collapses, and the bird falls as dead as Julius Cæsar. It has been shot through the brain; and as effusion takes place, it gradually loses consciousness, until nothing remains but the sense of the absolute necessity of continuing the flight, and not descending to the ground.

So I, choked by John Scraggs, lost consciousness of all else save the absolute necessity of maintaining that constant pumping motion with the hand. I was at sea, and I had cut my throat whilst shaving in a storm, but we had sprung a leak and I could not leave the pumps, else the ship would sink. I was at dinner, and there was a bone in my throat, but we were singing Auld Lang Syne, and I must not offend against the national traditions by letting go my neighbour's hand. I was rowing in a boat race, and a wasp was stinging my throat, but it was a desperate finish, and I must not break my stroke to brush away the wasp. I was playing Rugby football, and in a maul in goal a man was trying to scrag me. If I did not wrest the ball, I should be choked off presently. I gathered myself, and gave one or two desperate wrenches. The ball came. The scragger's hand was loosed. I fell upon the ground, and touched down amidst a hurricane of applause from the bystanders. After this I remembered nothing save a vague sense of delightful dreaming, until I awoke as from sleep. It was some time ere I realized that I was lying on the floor in John Scraggs' office. It seemed ages ago since that interview with him, but the clock over the chimney-piece in front of me made it only 10.5. I struggled to my feet, feeling weak and giddy. At first I did not see anything of Scraggs, but as my senses quickened, I was conscious of the sound of heavy breathing in the room, and, looking under the table, I saw a dark object lying. I lit a paper at the gas-jet, and held it under the table. Scraggs lay there, his head face downwards—doubtless just as I had touched it down. He was breathing heavily, and bleeding pretty freely from one ear. I tottered out to the street, but at the door I remembered that I had forgotten the coveted deed, and I returned to get it. But Scraggs had now recovered so far, and

crawled out on to the rug. I looked on the table, but the deed was not there, and for a moment I was puzzled. But—no; of course I had dropped it on the floor. I went round to pick it up, but meanwhile Scraggs had risen, and noticing the deed, he made a movement to get it. I was before him, however; but as I raised it in my hand, he tried to clutch hold of it. We glared at each other for a moment,—my last look of John Scraggs,—and my strength seemed to come again at the sight, for I struck him a tremendous blow between the eyes, that sent him clattering amongst the charter-boxes in the corner of the room.

I was far from well for some days, and suffered a good deal from bleeding in the throat, which kept me in the house for a week. My first impulse was to report the matter to the authorities; but the more I thought of it, the less I liked the idea. Except the assault upon myself, I could not substantiate any charge against Scraggs; and as for that, a professional man's reputation, like that of a lady, always suffers from being mixed up in a scandal, in however innocent or even praiseworthy a part. A day or two afterwards, however, I was relieved of all questionings on this matter by a paragraph in the *Evening News*, announcing the mysterious disappearance of a solicitor, leaving heavy defalcations behind him, and that solicitor—as I learned the same evening from my friend Rodger, who called to inquire for me—was, as I had suspected, no other than John Scraggs. I never heard of Scraggs again, but I have little doubt of his identity with a man—of whom I heard from an Australian practitioner—who, for a year or two, along with his son, hung about the Courts at Sydney, doing the lowest class of business, until at last he got five years for fraud. He served his time, and died a few months after his release in an almshouse. His son—Morgan, I doubt not—is now a *lifer* for horse-stealing.

I had no difficulty in satisfying the advisers of the Stewart family of the identity of George Stewart's remains. The skeleton now lies in the Glasgow Necropolis, to disturb the repose of travellers no more. There was a little more difficulty about the marriage; but after a threat of showing fight, the Stewart family were obliged to give way, and Mrs. Stewart took half of her husband's fortune. This was the more fortunate, as her recovery from the fever, though tedious, was most satisfactory. The fire seemed to have cleansed her brain, for when the fever left her, all the morbid eccentricity she displayed before had quite disappeared.

My tale began in the Parliament House, Edinburgh. There let it take end; but not in the law-room. In the corridor, rather, where, Medusa-like, sits the collector of the Advocates' Widows' Fund; and as I wend my way to his desk to pay that barbarous impost, the "age-tax on marriage," kind reader, pray that longer love and a kinder fate may await my bride, when cried in kirk and wed by parson, than befel her "irregular marriage."

Correspondence.

THE CASUALTY QUESTION.

(To the Editor of the Journal of Jurisprudence.)

SIR,—In prospect of the early reassembling of Parliament, it is natural that attention should revert to the question of casualties of superiority, and that "Simplex" should again advocate the views he formerly expressed in your magazine. I agree with him that the effect of the Conveyancing Act of 1874, in preventing the interjection of the heir of the last entered vassal, was in all likelihood not foreseen by the draughtsman of that Act, and that the point, not having been discussed in Parliament, was probably not in view of the Legislature. If such be the case, then it is only right and proper that the privilege of which proprietors have thus been deprived should be restored to them; and I think that in order to support that contention, it is not necessary to do more than show that that privilege, even though it may originally have been an "evasion," has become, by long continued use without objection from superiors, an "equitable avoidance" of their claims. But here I must join issue with your correspondent, and object to the proprietor's privilege being regarded as more than an "equitable avoidance." Arguing on "Simplex's" own lines, it cannot be said that the framers of the Act of 1747 (20 Geo. II. c. 50) had in view the interjection of the heir of the last vassal: there is nothing to show that they had in contemplation the keeping up of a barren mid-superiority, for the purpose of defeating or avoiding the superior's rights, or that they thought that possessors of land would, on the death of the last-entered vassal, do otherwise than enter with the superior, who by that Act was *bound* to receive them as his vassals on payment of a casualty of composition. I therefore hold that this privilege of proprietors was really, *in its origin*, an "evasion," arising from a device in conveyancing, and this view seems corroborated by the fact that, as "Simplex" points out, the same result can still be accomplished (as of old) by two separate deeds—an ordinary disposition and a subfeu charter; so that, keeping out of sight the retrospective aspect of the Act of 1874, its effect is simply to prevent an ordinary conveyance of land from now being presumptively a combination of the two deeds above mentioned, as was formerly the case with a disposition with an alternative manner of holding. "Simplex" characterizes that view as "absurd," and he puts forward three grounds for his contention; but I venture to think that these are fallacious in respect they proceed upon the assumption, that the presumed sub-infeudation in a disposition with an alternative holding really contained a proper subfeu. It was not, however, so regarded: thus, for instance, when the original charter from the superior prohibited

subinfeudation, the granting of a disposition with an alternative holding was not considered a contravention thereof. But, as I have already indicated, in admitting the proprietor's privilege to be now an "equitable avoidance," whatever its original character, I feel bound to grant "Simplex's" main contention, which is simply this, that proprietors have a grievance which should be rectified; and indeed the existence of such grievance is necessary for my own position. What I maintain is, that the grievance cannot be rectified as "Simplex" proposes, without so far disregarding that simplicity of title which has been the main object of all recent conveyancing statutes; and that apart from this the proposed rectification would not benefit proprietors generally, but merely those who were lucky enough to find the last vassal's heir. Besides, if this rectification were made, and proprietors were put upon as favourable a footing in this respect as they were before the Act of 1874, there would remain to them no special ground of complaint, and superiors might thereafter, with good reason, be content that their rights should not be further interfered with; and therefore I suggest that proprietors should offer not to insist upon such rectification in a manner which superiors say would lead to an evasion of their rights, provided that superiors, on the other hand, will agree to the whole subject of casualties being dealt with on a broad and equitable basis. The basis I have repeatedly advocated, both here and elsewhere, is commutation; that is to say, that in addition to the power of redemption by payment of a slump sum already possessed by proprietors, they should have the option of commuting both existing and all future casualties into an annual feu duty. This is somewhat a pet scheme of my own, and is put forward not in the interest of superiors, but rather as a suggestion to proprietors; and, so far as I am aware, it has not, as "Simplex" asserts, been in any way adopted by those whom he calls "the superiors' party."—I am, etc.,

REFORMER.

Obituary.

MR. JOHN MICHAEL POLLOCK STEVENSON, WRITER.—The death of this gentleman (aged 54 years) took place at Glasgow, on 24th December 1887. Mr. Stevenson was bred in the office of Mr. Alexander Dick, Writer (who is now the oldest member of the Glasgow Faculty of Procurators); and he and Mr. Alexander Dick, jun., were assumed as partners in the business in 1862. The firm was then Dick & Stevenson. Mr. Dick, sen., retired from business in 1868, and the business was continued by Mr. Stevenson and Mr. Dick, jun., until 1885, when they assumed Mr. John Muir, who had been their principal clerk for many years, as a

partner. Mr. Stevenson was Conservative in politics, but never allowed politics to interfere with his professional duties. He was a very shrewd man of business, an excellent conveyancer, and his advice and judgment were much appreciated by his clients.

Reviews.

A Handbook of the Parochial Ecclesiastical Law of Scotland. By WILLIAM GEORGE BLACK. Edinburgh: William Green & Sons.

FOR a considerable time the want of a book treating of this important and difficult subject has been strongly felt. Parochial ecclesiastical law is of the greatest importance to many classes of the community, but difficulty is often experienced in discovering the principle underlying decisions, and applying these to particular cases. This difficulty has been especially felt during the last few years; during which decisions have multiplied without any attempt being made to collate, compare, and analyse them. It is true that Mr. Duncan's well-known book is to be found in all law libraries; but no edition of it has been published since 1869, and copies are now so scarce, that quite recently one fetched at a sale of law books the high price of five pounds.

There can be no doubt that Mr. Black's task has been greatly lightened by the assistance he has derived from Mr. Duncan's book; and, in the preface to the present volume, he expresses a hope that the work may be found useful, as a supplement, by those who already possess the larger treatise of Mr. Duncan. But the new handbook is quite able to stand on its own merits, and a very hasty glance over its pages is sufficient to reveal several new features. Obviously it would be unfair to institute any comparison between Mr. Black's book and the older and larger treatises on the same subject. The work under review professes to be merely a handbook; and it may be said at once, that as such, it is likely to prove very useful. In such a book many subjects must necessarily be treated in a condensed form; but, although extending only to some 200 pages, the volume will be found to contain a summary of the law of Scotland on parochial ecclesiastical matters, which, while concise, is not deficient in fulness.

The arrangement of the handbook is simple and natural. It is divided into four parts, of which the first treats of the Parish and the rights and duties of Heritors. The second part is devoted to the Ecclesiastical Institutions existing in the Parish; while the third part deals with the various offices and jurisdictions

necessary to the maintenance and working of parochial ecclesiastical institutions. The fourth part is a new feature in works on Parochial Ecclesiastical Law, being a chapter on Dissenting Churches, which is full of interesting matter hitherto uncollected.

As previously mentioned, one of the most important features of Mr. Black's book is the collection and analysis of the decisions since 1869. These appear to have been carefully summarized, and, so far as we have been able to observe, accurately quoted. Another prominent feature is the careful and full consideration given to the details connected with the management of parochial ecclesiastical affairs, and many forms of notices and the like are given, as well as practical suggestions, which are likely to be appreciated more especially by ministers, heritors' clerks, and others interested. The general index to the handbook has been carefully compiled, and, in addition, there are separate indices of cases quoted and parishes.

On the whole Mr. Black may be congratulated on having produced a very useful handbook. It only remains to say that the printing and general appearance of the volume do the publishers every credit.

BOOKS RECEIVED.

We have on our table *The Law Quarterly Review* (Stevens & Sons), and *The Leisure Hour*.

The Month.

NOTES FROM LONDON.

It is rumoured that the Attorney-Generalship of British Honduras may shortly be vacant. The salary has hitherto been £400, together with private practice. Intending competitors should read the romance of Abraham Mallory Dillet in the September number of the Appeal Cases (p. 459).

* * *

IN November last a new law journal, entitled *The Quarterly Review of Jurisprudence*, was issued. It is edited by Mr. Syme Yeatman, barrister, and published by Simpkin, Marshall, & Co. The first number is highly entertaining. "Is there any necessity for such a work?" Mr. Yeatman asks himself, with great candour, and hesitates not to return an affirmative answer. The deplorable position of the Common Law Bar must be altered; the reckless folly of the authors of the Judicature Acts must be reprovèd; the infamy of Circuit messes, and the shamelessness of judges who angle

for briefs to their sons, must be ruthlessly exposed; every crushed man must have full opportunity of clearing himself, etc. Mr. Yeatman will find some difficulty, however, in maintaining his distinction between private vices and professional misconduct. The crushed men who appeal to him are apt to throw mud. Nor will the legal public be roused to a white heat of interest over forgotten, if not imaginary, wrongs.

* * *

CAN the arbitration clause of the English policy of a Scotch Insurance Company be enforced, if it does not contain an agreement to make the submission a rule of Court? The point has not been expressly decided, at least in recent years. The case of *Die Deutsche Springsteff*, etc., settled a few weeks ago, makes it doubtful. *Viney v. Bignold*, a later decision, gives colour to the view that the rule of Court clause is unnecessary. The Railway Company Arbitration Act, 1859, is silent on the subject. The coming legislation on the law of arbitration will doubtless settle the difficulty once for all.

* * *

THE Law of Murder has within recent years been the subject of judicial discussion and definition. In *Reg. v. Dudley* (14 Q. B. D. 273) it was held that self-preservation, as distinct from self-defence, will not make homicide justifiable. Therefore if A. and B., two shipwrecked sailors, lay hold of a floating plank, which will support one but not both of them, and A., considering his own life to have the greater "real value" to society, push B. into the water, and escape to land, he is guilty of murder. In *Reg. v. Serne*, tried at the last Old Bailey Sessions, Mr. Justice Stephen gave the weight of his high authority to "the domestic fowl" dictum of Mr. Justice Foster. A. intending to steal B.'s fowl—which is felony—tries to shoot it, and kills B. by mistake. A. has murdered B. But the act would not (?) be murder—if Sir James Stephen is right—had A. only fired at B.'s fowl in fun.

* * *

THE power of counsel to compromise an action was fully discussed before the Master of the Rolls and Lords-Justices Bowen and Fry, on 28th November last, in the case of *Matthews v. Munster*. This was an action for malicious prosecution, in which the defendant's counsel, in the absence of the defendant and his solicitor, had agreed to a judgment against his client for £350 and costs. The defendant subsequently came into Court, and immediately repudiated the compromise. The Court of Appeal, however, held that it could not be set aside, and declared—(1) that, subject to the control of the presiding judge,—who will see that no manifest injustice is done,—an advocate has unlimited power to do

what he thinks best for his client ; (2) that the only mode in which a client can put an end to this paramount authority is by insisting upon the advocate withdrawing from the case ; and (3) that notice of this revocation of the advocate's authority must be given to the other side.—*Cp. Strauss v. Francis*, L. R. 1 Q. B. 379, and *Swinfen v. Lord Chelmsford*, 8 W. R. 544.

* * *

By a curious legal anomaly, while suits for nullity and petitions for judicial separation can be heard *in camera*, there is no power given by the Divorce Act to try suits for dissolution of marriage with closed doors. The general public, however, appears to be ignorant of its melancholy privilege in such cases: and, on the trial of the cross-actions in *Otway v. Otway* last week, Mr. Justice Butt unceremoniously, and successfully, ordered the Court to be cleared.

LEX.

THE Faculty of Advocates met on the 13th ult. for the purpose of selecting two gentlemen in order to send their names to the Curators of the University, with whom the patronage of the vacant chair of Scots Law ultimately lies. There were four candidates, Messrs. Rhind, Rankine, Begg, and Goudy, but Mr. Rhind withdrew before the voting. The result of the vote was that Mr. Rankine was nominated for the first place on the list by a large majority; and on another vote being taken for the second place, Mr. Goudy was successful. The Curators of the University met on the 23rd ult., and unanimously elected Mr. Rankine as professor. Mr. Rankine enters on his duties with the best wishes of the whole profession. His name is a guarantee for the future efficient teaching of this class.

* * *

THE *Law Journal* notices that in *R. v. The Market Bosworth Justices* (56 L. J. M. C. 96) a learned counsel appeared, in a sense, on both sides—a phenomenon which is due to the neglect in the Divisional Courts, not shared in the Court of Appeal, of a very sound rule, that the opinions of living counsel cannot be cited in Courts of law. The learned counsel who showed cause against the rule was allowed to cite Paterson *On Licensing* as an authority on his side. No one in Court could have supposed that so great a misfortune to magisterial jurisprudence had happened as that the author of the book was no longer with us, for there was Mr. Paterson himself in the flesh prepared to argue individually the opposite view to that for which he was responsible authoritatively!

To get ahead of Colonel Ingersoll in a strife of wit one must get up very early in the morning; indeed, sit up all night. We recently heard a notable argument between him and Ex-Judge Noah Davis, on the question whether innkeepers in the city of New York have a right under the statute to furnish wine, etc., to their guests at table on Sunday. A good deal turned on the meaning of "entertainment." Judge Davis asked if counsel supposed that the "entertainment" of strangers recommended by St. Paul in the New Testament, "because thereby some have entertained angels unawares," included strong drink. Colonel Ingersoll replied that he didn't know about that, but he did know that when St. Paul came in sight of "Three Taverns" on his way to Rome, he "thanked God, and took courage." Would the Colonel intimate that it was "Dutch courage"?—*Albany Law Journal*.

* * *

IN *Stewart v. Stewart*, Dec. 3, 1887, the First Division reduced the aliment payable by a husband to his wife, for her maintenance and that of two daughters, from £250 to £150. The husband's income was £430, and there was no evidence of a change in his circumstances since the date at which the larger amount had been paid.

* * *

THE case of *Kennedy v. Creyk*, Dec. 6, 1887, arose out of the following circumstances:—A party had sub-let a farm,—the sub-tenants came under an obligation to leave 300 sheep on the farm as a security for the rent. The tenant after applied for, and obtained in absence, a warrant from the Sheriff for the sale of as many of the sheep as would pay the rent. One of the sub-tenants then brought this action of damages, contending that the sale was illegal, as the warrant did not proceed upon a decree. The Second Division sustained the validity of the proceedings, and further held that the defender was barred by his non-appearance from objecting to the regularity of the Sheriff Court proceedings.

* * *

LORD RUTHERFURD CLARK dissented, however; although he considered the judgment merciful to the parties in it, and saved them a jury trial. It was a perfectly new idea to him, that an application to sell the property of another, while in his hands, could be a legal proceeding; nor could the absence of the pursuer in the Court below render legal what was otherwise illegal.

* * *

IN *Denholm & Co. v. Halmoe and another* (Second Division), Dec. 7, 1887, we find the law of Scotland applied in a question between a foreigner and Scotsmen, to the prejudice of the latter.

THE recent case of *Stevenson v. Pontifex & Wood*, Dec. 7, 1887, decided an important question. According to the Lord President, it was the first example of any attempt, at least in modern times, to recover by instalments in successive actions the continuing damage resulting from one delict or one breach of contract. An action of damages had been raised upon an alleged breach of engagement. It was compromised by the acceptance of a sum tendered in full of the pursuer's claims. He subsequently brought another action for the damage which had been caused to him since the date of his first legal proceedings. The defenders were assoilzied. "I hold," said the Lord President, "the true rule of practice, based on sound principle, to be, that though the delict or breach of contract be of such a nature that it will necessarily be followed by injurious consequences in the future,—and though it may, for this reason, be impossible to ascertain with precise accuracy, at the date of the action or of the verdict, the amount of loss which will result,—yet the whole damage must be recovered in one action, because there is but one cause of action."

* *

BUT in the case of a nuisance, it is not necessary to recover the whole damage in one action, "because he who commits the nuisance is under a constant legal obligation to abate it; and so long as he fails in performing that legal obligation, he is every day committing a fresh nuisance."—*Per* the Lord President.

* *

THE question whether the absence of a widow can be added to that of her deceased husband, so as to exclude any claim of relief on her part against the parish in which he had a residential settlement, was answered in the affirmative by the Second Division in *Anderson v. Glass*, Dec. 9, 1887. In that case the husband left his parish at Whitsunday 1881, and died in March 1885, before he had completed an absence of four years. But his widow became chargeable in the following month of September. It was held, *dub.* the Lord Justice-Clerk, that the parish of her birth was liable. This decision seems in conformity with that of *Allan v. Higgins and others*, 3 Macp. 309. The law seems, however, to be different in the case of acquiring a settlement. The period of residence of a widow cannot be added to that of her husband so as to complete the necessary number of years (*Kirkwood v. Wylie*, 3 Macp. 399).

* *

PENDING the decision of an appeal from the Sheriff-Substitute to the Sheriff, it is not competent to remove the case to the Court of Session for jury trial. *Per* Lord Adam,—“Where the interlocutor of the Sheriff-Substitute was appealed to the Sheriff, there was

no longer an operative judgment in the Sheriff Court. Nothing could have been done on the interlocutor of the Sheriff-Substitute, and it cannot be brought here under the Judicature Act.”—*M'Arthur v. Boucher* (First Division), Dec. 8, 1887.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT, KIRKCALDY.

Sheriffs MACKAY and GILLESPIE.

LESLIE TOWN COUNCIL v. KIRK AND OTHERS.

Interdict—Burgh of barony—Right to, and use of, common lands.—In an action of interdict, at the instance of the Leslie Town Council, to prohibit games on a part of the common lands of the burgh of Leslie, promoted by persons who were neither feuars nor burgesses of Leslie: *Held*, Pursuers entitled to interdict. Observations on the character of a burgh of barony and its common lands.

The facts of the case sufficiently appear from the note of the Sheriff (Mackay), appended to his interlocutor of 24th November 1887, by which he adhered to the interlocutor of the Sheriff-Substitute (Gillespie), of 19th October 1887, granting interdict.

“*Note.*—It is perhaps worth while, though not necessary for the decision of this case, to state in a few sentences the history of the burgh of barony of Leslie, as disclosed by the writings produced. There are few burghs of barony holding of lay superiors which can produce records of earlier date. A burgh of barony being a burgh within a barony, holding of the baron as superior, requires in general two charters for its creation,—one from the Crown, authorizing it to be created, and the other from the baron, granting certain lands to the burgesses, and transmitting the privileges conferred by the Crown. The first Crown charter in favour of Leslie, dated 21st March 1457, proceeds on a resignation by George Leslie, who had shortly before been created first Earl of Rothes, and erects the Villa de Leslie into a free burgh of barony (*liberum Burgum in Baroniam*), with a grant of market and fair, and the customary rights of free trading. On 8th December 1514, George, the third Earl, feued a portion, 47 roods, of his lands near the burgh of Leslie to certain persons, in specific lots of so many roods each; and these feuars, there can be little doubt, represented a portion, perhaps the whole, of the first burgesses of Leslie. On 10th July 1539, a charter by James V. in favour of George, third Earl of Rothes, ratified the creation of Leslie into a burgh of barony; and, besides the rights of trade given by the charter of 1457, conferred upon the burgh the power of electing, yearly, bailies and other officers necessary for its government (*pro ejusdem regimine necessarios*).

“John, fifth Earl of Rothes, in the narrative that sasine had not been

taken upon the charter of his grandfather, the third Earl, granted a new charter, dated 3rd October 1627, in favour of the inhabitants of the burgh of Leslie therein named, of certain specific feus of so many roods each, including the 47 roods contained in the charter of 1514, and also additional lands then feued for the first time. He conferred upon the feuars all the privileges of burgesses of a burgh of barony, and in particular decerned and ordained the inhabitants and community of the burgh to have power of creating their 'bailies, treasurer, officers, sergeants, and free burgesses of the said burgh of barony, and componing with them, with powers to the bailies to receive the entries of each heir and resignations of the inhabitants, and granting heritable infeftments thereupon.' The word inhabitants in this charter is used as equivalent to the feuars, who formed at that date the burgesses or community of the burgh. In connection with these feus the burgh of Leslie held certain common lands in its immediate neighbourhood.

"A minute of the Head Court (*curia capitalis*) of the burgh, recorded in its earliest minute book, dated 19th October 1627, has appended to it a note, that 'the commonities be bounded, to witt, fra Lothrie Brig, in the eist, till the White Cow of Leven (a well-known stone, still existing, so called), or the foot of the Larg, and that all persons be secluded therefra but those only that are insert in the charter,' and this note is signed by the Earl and the two bailies of the burgh.

"A continuous series of minutes, from 1627 to the present time, and a few of earlier dates, prove that the burgesses have acted upon the power conferred on them of electing magistrates and creating new burgesses. Several excambions in particular, in the years 1737, 1749, 1876, between the burgh and the Earl and Countess of Rothes, for the time have altered the boundaries of the commonity lands, but they continue to be, and are, a perfectly well-known and defined portion of land in the neighbourhood of the burgh.

"The piece of ground, about the use of which this dispute has arisen, is, beyond doubt, situated within the commonity lands.

"The excambion of 1876 expressly states that the lands given in excambion are to be held 'by the Town Council of Leslie, as part of the common lands of Leslie, and for the benefit of the feuars of Leslie, in the same way as they had previously held the other common lands.'

"It is in these circumstances that the question has arisen whether the magistrates, for the time being, have the power to prohibit the games in question from being held on part of the common lands, by persons who are not feuars or burgesses of Leslie, but inhabitants only—some of these of the old town or proper burgh, and some of these of the adjacent new town.

"There is no question of alienation of the lands by the magistrates, as in the recent *Kirkcaldy* case. The sole question is as to the administration or regulation of the use of a part of the common good, which consists of commonity lands. A new Council having been elected since the case was before the Sheriff-Substitute, the members of it have been sisted in lieu of their predecessors, and maintain the same pleas.

"It was contended for the defenders, the promoters of the games—(1) That the original pursuers had no title to sue, because it is alleged they were not elected legally to the offices in the Town Council, which they in

fact held at the date of the petition. But this question cannot be decided in the present process. The persons who acted as the Council without legal challenge must be treated as the Council. It was contended (2) That the Town Council of Leslie have no title to the portion of the common lands on which they prohibited the games. If it were necessary, I should have little difficulty in holding that, under the writs founded on, the burgesses who constitute the community of the burgh of barony of Leslie have, in addition to their several feus, right to certain common lands, usually called the common, and that the Council, as their representatives, have a sufficient title to administer these lands as a part of the common good of the burgh. But in a question with the defenders, none of whom are feuars, and who have no written title, I concur with the Sheriff-Substitute that the long possession of centuries, far exceeding the years of prescription, is itself sufficient. There may be difficulty in ascertaining with absolute precision, from the writs, the whole original boundaries of these common lands, though further investigation would probably enable this to be done; but here, again, the long possession of the portion of the common lands in question comes in, and removes all doubt that it is a part of the common good of the burgh. It was maintained (3) That in point of fact this portion of the common lands has been dedicated to public uses, including such games as were here proposed to be held. This is matter of proof, and I agree with the Sheriff-Substitute that the result of the proof is, that this portion of the common lands has, for time immemorial, been under the administration of the Council, although that administration may at times have been somewhat lax, and may even have occasionally tolerated its use for games without express consent; but I must say the proof of this last point is meagre, and does not cover the case of such public competitive games as were here proposed to be held. I further hold, without hesitation, that there has been no such public use (as distinguished from the common use by the burgesses) as amounts in law to dedication to the public. The green, which probably gave the name of Leslie Green to the burgh in the charter of 1457, may be in a different position. It is possible that this was the scene of the games so vividly described in the form of Christ's Kirk on the green. But the ground here in question is not part of the green, but of the other common lands, which the proof shows have been dealt with very much as the land familiarly known as the Burgh Acres, in the case of Royal Burghs, is in use to be dealt with, by being generally pastured, and sometimes ploughed and cropped by the burgesses.

"In 1853 interdict was granted by the Sheriff of Fife against the villagers of Croft Outerly trespassing on a part of their common lands, in an action at the instance of the Council.

"The doctrine of Lord St. Leonards, in *Dyce v. Hay*, 1 Macq. 311, that 'there may be a custom laid for sports generally as for village recreation,' was founded on, but cannot affect a case where no such custom has been proved. On the other hand, the decision in that case, and the *Lochgelly* case, *Henderson v. Earl of Minto*, 22 D. 1126, are—though differing in circumstances from the present case, so as not to form precedents—very instructive, as showing the difficulty of establishing such a custom against the proprietor of private property.

"The decision in the *Lochgelly* case raises a further question, which I find it unnecessary to decide, Whether the defenders, who are either mere members of the public, or mere inhabitants (not feuars) of the burgh of Leslie, or the adjacent new town, have any title to maintain the plea of dedication ?

"The only remaining point argued was, that as the defenders, when prohibited by the Council, desisted from holding the games on this piece of ground, they should not be liable in expenses, or subject to interdict. But, while desisting for the occasion, they joined issue on the right of the Town Council to prohibit them, and, having failed in the issue, the usual consequences must follow as to expenses. As to interdict, the pursuers are entitled to that remedy against persons who have asserted and failed to establish an adverse right, to use the land of which the pursuers are the trustees on behalf of the community of Leslie. My opinion might have been more briefly expressed, by saying that the ground in question is established by the proof to be a part of the common lands of the burgh, subject to the administration and regulation of the Council for behoof of the burgesses. But I have thought it right to deal with the separate points of the defenders' argument."

FALKIRK SMALL DEBT COURT.

Sheriff SCOTT-MONCRIEFF.

BECKMAN v. P. AND J. WILKIE.

Charter party—Measurement of freight—Custom of port.—The custom of a port was to measure timber by a sworn private measurer, chosen and jointly paid by the captain and the consignees of the cargo. A charter party provided for the delivery of timber "Customs' Fund calliper measure." A dispute having arisen, the timber was measured by a private measurer for the consignees, and by the Custom House official on behalf of the captain: *Held*, that freight was to be estimated according to the measurement produced by the latter; but, in the circumstances, that the measurers should be paid by the parties who employed them.

In this case the Sheriff-Substitute delivered the following judgment:—

"This action has arisen out of a dispute between the captain of a foreign vessel, which recently arrived with a cargo of timber at the port of Grangemouth, and the consignees, timber merchants in that port, relating to the measurement of the timber. The usual, though not invariable, practice in Grangemouth is to have a measurement made, at the joint expense of the merchant and the captain, by a private sworn measurer—by 'private' I mean a measurer not attached to the Custom House. The merchants preferred a private individual. The result has been that there are presented to the Court two measurements, one by David Brown, sworn measurer, bringing out a cargo of 478 18-50th loads; and the other certified by the collector of H.M. Customs as a true copy from the books of the Customs' Fund Office at Grangemouth.

According to it the cargo of timber amounted to 479 loads 18 feet. Now, under the charter party, the timber was to be delivered 'Customs' Fund calliper measure.' The expression 'Customs' Fund,' used in this connection, is acknowledged to be of recent origin, but to have the same meaning as others formerly used, such as 'Queen's calliper measure,' and 'Bill of Entry calliper measure'—phrases which had their origin in the days when imported timber was subject to a duty. Since that duty was abolished, private measurers have become numerous, who all prefer to use the Queen's calliper measure; while at the same time there are, although not in every port, measurers attached to the Customs' Fund Measuring Department. There happens to be such an official at Grangemouth, and it is upon the basis of his measurement that the pursuer estimates the amount of freight due to him. Now, without determining whether in every case, when such expressions occur in a charter party, Queen's or Customs' Fund calliper measure must be obtained from the Custom House official, it is surely reasonable to hold, when a dispute arises, that the best evidence of what that particular measure is must be afforded by the official measurement. Reverse the position of matters, and let us suppose that one of the Grangemouth merchants sent timber to a foreign port, under a similar charter party, would he be satisfied if his captain, upon his return, informed him that the freight had been accepted upon the measurement of a private individual, while that of the official measurer entitled him to a larger amount? It is said, and evidence has been led in support of the averment, that Cook, the Customs' Fund measurer, here adopted a false principle in measuring this timber. It may be so, but nevertheless it is the fact that his measurement bears the stamp of the Customs' Fund Timber Measuring Department. Let Cook's mistakes, assuming that he has made them, be rectified for the future by a representation to the proper quarter. I am therefore of opinion that freight must be paid according to the measurement produced by the pursuer. But does it necessarily follow that the pursuer is entitled to recover half of the measurer's fees from the defender? The custom has certainly been to divide the expenses, but the custom has also been to agree upon a measurer. Here the pursuer and defenders have measured separately, and, looking to the whole circumstances of the case, I am prepared to hold that they should pay separately."

Act. Stirling—Alt. Wilson.

Notes of English, American, and Colonial Cases.

COMPANY.—Debentures—Judgment—Receiver.—Debentures were issued by a tramway company in 1878, and other debentures were issued in 1883 by another tramway company with which the first had been incorporated. An action was brought against the new company by a holder of debentures of the issue of 1878, on behalf of himself and all the other holders of debentures of that issue:—*Held*, that a declaration should be made that the debenture-holders of that issue were entitled to stand in

the position of judgment creditors for the amount of their debentures, and that a receiver should be appointed of all the property of the company not included in an order previously made appointing a receiver in the action, and also in an action brought by a holder of debentures of the issue of 1883.—*Hope v. Croydon & Norwood Tramways Co.*, 56 L. J. Rep. Ch. 760.

COMPANY.—*Reduction of capital—Writing off lost capital—Advertisement of petition—Companies Act, 1867 (30 and 31 Vict. c. 131), Companies Act, 1877 (40 and 41 Vict. c. 26), s. 4—General Orders, March 1868, rule 5.*—In cases of petitions for the reduction of the capital of a company by writing off paid-up capital which has been lost, the Court does not, as a matter of course, dispense with advertisement of the petition, even although it be stated that there are no creditors.—*In re E. C. Powder Co. Lim.*, 56 L. J. Rep. Ch. 783.

COMPANY.—*Shares—Paid-up shares—No contract filed—Cancellation of shares and issue of new shares—Companies Act, 1862, s. 35; 1867, s. 25.*—On the conversion of a private copartnership business in 1873 into a limited company, it was arranged that the capital of the new company should be divided into £100 shares, and that all those shares should be distributed among the partners in the old firm in payment for their respective interests, £78 on each share being treated as fully paid up. All the arrangements were left to the solicitor acting in the matter, and the company was duly formed, and the shares issued, but no contract in writing was filed with the Registrar of Joint-Stock Companies under section 25 of the Companies Act, 1867, and in fact no such contract was entered into. In 1887 the shareholders in the company became aware that, in consequence of there being no contract filed, they might be called upon to pay for their shares in full in the event of a winding up, and they all applied to the Court for an order striking their names off the register as holders of these shares, and directing new shares to be issued to them after a proper contract had been filed:—*Held*, that this might be done upon provision being made, to the satisfaction of the Court, for meeting all the existing liabilities of the company, and upon a proper contract for filing being produced to the Court and approved.—*In re The Darlington Forge Co. Lim.*, 56 L. J. Rep. Ch. 730.

COMPANY.—*Winding up—Distress for rent—Mortgage—Attornment clause—Liquidator in possession—Leave of Court—Companies Act, 1862 (25 and 26 Vict. c. 89), ss. 87 and 163.*—To entitle a landlord to obtain leave to distrain under section 87 of the Companies Act, 1862, he must show, either that it is inequitable for the company or its liquidator to insist on section 163 of that Act, or that the rent in respect of which leave to distrain is sought ought to be treated as part of the costs, charges, and expenses of the winding up.—*In re The Lancashire Cotton Spinning Co. Lim. (App.)*, 56 L. J. Rep. Ch. 761.

THE JOURNAL OF JURISPRUDENCE.

THE CANON LAW AND SCOTTISH PRESBY- TERIANISM.¹

THE study of the Canon Law seems to have been all but abandoned in Scotland. Bankton repeatedly observes that it has little but antiquarian interest for modern lawyers. But it has more: and even though it had no practical interest whatever, the total neglect of the study, in those days of historical research, restoration of ancient art, and revival of the antique, will, I suppose, be justified by few. Our universities, indeed, confer degrees in both laws,—*i.e.* the Canon and the Civil; but they act on the principle of the enterprising grocers who advertise that they sell tea at a cheap rate, and give away sugar for nothing, for they ask only moderate attainments in the Civil Law, and no attainments at all in the Canon. When Pope Nicholas V. founded Glasgow University, his charter makes express mention of a Faculty of the Canon Law; and no doubt it was taught there in the early days of that institution. Little did the professors and students of those days think that, in four centuries, their favourite study would be forgotten and their Faculty lost. Even in poor little St. Andrews, the Canonists held at first a proud position; and among its first regents we notice the names of several Doctors of Decrees (*i.e.* Doctors of the Canon Law), to distinguish them from Doctors of Laws—the civilians.²

¹ A lecture read by Mr. Wm. Galbraith Miller, Advocate, to the Glasgow Legal and Speculative Society, at the end of session 1886-87.

² It appears that the degree of LL.D. is not equivalent to the *Utriusque juris doctor*, but to the Doctorship of Civil Law alone, while D.D. would perhaps at first stand for Doctor of the Canon Law, and only at a later date be associated with Doctor of Theology. See Savigny's *History of Roman Law* (French translation), iii. 196, where a list of Bolognese professors with law degrees given in a note, affords some support to this conjecture. Scotch practice is rapidly making LL.D. an Arts degree, for it appears even in newspapers to be understood as implying Doctor of Logic and Languages.

The word *Canon* is Greek, and corresponds to the Latin *Regula*—a rule. It was originally applied to the rules laid down by the great councils of the Church. Collections of these were made at various times; and ultimately, about the year 1150, Gratian, a Benedictine monk, residing at Bologna, the great home of the Civil Law, prepared a new code of the Canon Law.

"The *Decretum* of Gratian is divided into three parts. The first part is divided into 101 *distinctiones*. The first twenty of these *distinctiones* are concerned with law in general, and Canon Law in particular. Afterwards the different orders of the clergy—their qualifications, ordinations, duties, and powers—are treated of. The second part is distributed into thirty-six Cases, each embracing several questions, which are treated of in one or more chapters. This part deals with the rules and principles of proceedings in ecclesiastic courts." (It is entitled *De Penitentia*.) "The third is much shorter than either of the preceding. It is divided into five *distinctiones*, and treats of the consecration of churches, public worship, the sacraments, fasts, festivals, and images." (Amos, *Roman Civil Law*, 430.) This part is contained in the first volume of Richter and Friedberg's sumptuous edition of the *Corpus Juris Canonici*. By a decree of Pope Eugenius III., in 1153, its study was apportioned over five years, so as to qualify for the degrees of Bachelor, Licentiate, and Doctor of Canon Law.

It was Gregory IX. who emulated Justinian by publishing the whole in the form of a Code, adding a collection of Papal Rescripts to imitate the *Codex* of the Civil Law. These are comprised in five books. A sixth was added in 1298 by Boniface VIII. There are also Constitutions of Clement V. and John XXII., and a collection of decrees from Urban VI. to Sixtus IV. And finally, Pope Paul IV. ordered John Paul Launcelott to prepare Institutes like those of Tribonian. These were added to the *Corpus Juris* by Pope Gregory XIII., but are not properly a part of it, and are therefore not included in Richter and Friedberg's edition. There are many Institutes of the Canon Law, but Launcelott's little volumes are very readable, and may be recommended as giving a useful outline of the subject, arranged in the same order as Justinian's Institutes. The Decretals of Gregory and the other Popes go over the same grounds as the *Decretum* of Gratian, viz. procedure, evidence, oaths, the clergy, marriage, crime, and so forth.

In point of fact the Canon Law is evidence of the temporary supremacy of the Catholic Church. It was a Code which was capable of extension and application to the whole of human affairs. It was a municipal law for the kingdom of God on earth, and it only was treated as a merely *ecclesiastical* law, when the Civil Law again became supreme.

It is interesting to note the relation of the Canon and the Civil Laws in the Middle Ages,—not very unlike that of law and equity

in England at the present moment. "It was admitted," says Professor Amos, "that if, on a matter of mere interpretation, either system expressed itself ambiguously or uncertainly, it was allowable to have recourse to the other, whatever the court or the case in hand. The same rule prevailed if either system was entirely silent on a question in dispute. Where there was a conflict, the Canon Law rule prevailed in Church courts and in the dominions of the Church, while the Civil Law rule prevailed in secular courts and in the dominions of secular sovereigns. "In any case that presented itself, whatever the court, the Civil Law gave way to the Canon Law, whenever the matter in hand seemed to touch the safety of souls or the commission of sin. Thus in prescriptions, while the Civil Law allowed a term of lengthened prescription to give a title even to a *mala fide* possessor, the Canon Law did not, and this latter rule prevailed. So in usury cases the Canon Law rules were followed. In marriage questions the Canon Law prevailed: the consequences being, that a marriage might be held good even in the absence of the requisite consent of parents; and a wife who had survived her husband might marry again within the year, the Canon Law removing the penalties imposed by the Civil Law. So also in matters of moral justice: if the Canon Law was more favourable to a benign and equitable view of the situation than the Civil Law, the Canon Law principle prevailed" (*Roman Civil Law*, 433).

It should be borne in mind, however, that the Canon Law had drawn its first authority as law from the Emperor Justinian, who, in the first chapter of his 131st Novel, decreed that the Canons of the Councils of Nicæa, Constantinople, Ephesus, and Chalcedon should have the force of laws, and be held equivalent to holy Scripture. This Novel is dated 545 A.D.,—just 600 years before the time of Gratian.

It has been supposed that the Canon Law prevailed in Scotland prior to the Reformation. It was certainly taught in the universities, and appears to have been studied, at a later date, on the Continent by students preparing for the Bar; moreover, it was specially abolished by the Act 1567, cap. 31. And in the Second Book of Discipline the Canon Law is frequently spoken of as a part of Romish corruption. The Pope and the Canon Law are grouped together, and are said to have "na place in the reformat Kirk" (xi. 3). But yet Lord Fraser (H. & W. 224) holds that the general Canon Law was never fully acknowledged in this country. And though it may be quoted in our courts, it is only law when expressly adopted; it has no inherent authority, and is entitled to no more respect than the laws of France and America,—that is, its own inherent reasonableness and equity. The authority, dating from Stair downwards, in favour of this view is overwhelming.

Whatever may have been its authority prior to the Reformation,

there is no doubt that from this point the authority of the Canon Law declined, and we observe a process of disintegration corresponding to the intrinsic nature of the enactments composing that law. We have—(1) laws made by ecclesiastical councils or judges as to secular affairs; (2) laws made by secular bodies and judges as to ecclesiastical affairs; and (3) laws made by ecclesiastical bodies and judges as to their own proper affairs. And I shall now deal with these in order. And—

(1) We have laws made by ecclesiastical councils or judges as to secular affairs. These form a large portion of the *Corpus Juris*, and deal not only with marriage and divorce, succession and wills, but with sale, cautionry, pledge, and, generally, the whole municipal law. It is in this way the Canon Law has left strong traces in the law of prescription, usury, marriage, divorce, and even conveyancing. This accounts for the peculiar forms in completing the title of executors. The Bishop and the Bishop's Court took special charge of the succession of deceased persons, and the Commissary Court, till it was or is completely merged in the Sheriff Court, represented or represents the Bishop's Court. The practitioners in those courts were *procuratores*, a name derived from the Civil Law, and kept up in the English proctors in the Consistorial Courts. But it was perhaps in conveyancing that the commonest traces of ecclesiastical usage were found. Ross traces the wadset to the Canonists in their attempts to evade the laws of usury, stipulating for penalties in place of interest. Every notary—an office not inconsistent with the dignity of an advocate—is in some sense a Churchman. The office of notary owes its origin, no doubt, to the Civil Law; but the widespread influence and the high position of the notary are due to the Church and the Canon Law. The notarial instruments, abolished in 1845, always began with a solemn invocation, and the docquet bore the diocese to which the notary belonged, and from whose bishop, in a former age, he would have derived his authority. And for this reason no notary who has any historical interest in his office would adopt a motto from the Civil Law, but would derive it from the *Corpus Juris Canonici*, or, better still, the Bible itself. Even in small things may we not trace ecclesiastical influence?—e.g. in the extensive shaving which prevails in the Parliament House, particularly among the old judges and a few of their modern representatives. When we look at the beardless faces of the pictures hanging on the walls, or sitting in marble busts, or smiling on the bench, we are reminded that the Council of Carthage long ago decreed, “Clericus neque comam nutriat, neque barbam” (*Decretalia* iii. 1, 5).

But (2) we have laws made by the secular Legislature, and administered by secular tribunals, for the Church. This is properly ecclesiastical law as distinguished from Canon Law. We had an example of this in the Novel of Justinian, cited a little ago.

Of this nature, in our own country, was the Aberdeen Act, so famous in its day, the Patronage Abolition Act, the Church Rates Act, and, generally, the whole law administered in the Court of Teinds as well as the law administered in the ordinary courts in regard to ecclesiastical matters. This ecclesiastical law is law in exactly the same sense as military and naval law, which applies to soldiers and sailors; maritime law, which applies to the mercantile marine; railway law, or carriers' law, which apply to men grouped as railway companies or carriers and their customers. It is truly a part of the municipal law enacted, sanctioned and enforced by the State. The Church of Scotland is thus a great corporation, as Bankton maintains; the Dissenting Churches are voluntary associations, but still subject to the law; and just in proportion as they realize their functions as churches, they will be more respectful and obedient to the municipal law. I have no time, even if I had the inclination, to enter here on a discussion of the proper relation of the various Churches to the State, or of the various Canon Laws to the municipal law. On that subject I would refer you to the interesting work of Mr. Taylor Innes on the *Law of Creeds*, and to the recent cases of *Forbes v. Eden* (L.R., 1 H.L.Sc. 569), *Brown v. Curé, etc., de Montreal* (L.R., 6 P.C. 157), and *Merriman v. Williams* (L.R. 7, App. Cases 484). I would only remark in passing, that when the Churches come to realize fully their proper relation to the world, they will find that the kingdom of God does not consist in eating and drinking, but in righteousness and peace, and that there are more important subjects than Church rates, teinds, sustentation funds, points of ritual or Church government, and higher objects at which they can aim than either establishment or disestablishment, endowment or disendowment.

(3) I come now to the third division of Canon Law proper in the Presbyterian Churches—laws made by the Churches for themselves in regard to their own proper affairs. Wherever rational beings meet there must be law, even though it is only to play a game at marbles or to organize a burglary. Both Milton and Goethe emphasize the fact that even in hell there is law and order, and even some virtue. *Ubi societas ibi jus*. So must it be with Churches. They cannot exist for a moment without having special rules applicable particularly to themselves. These are their canons: the body of them is their Canon Law. And it is noteworthy that the latest addition to English sects—the Salvation Army—has created a Canon Law and a constitution for itself. General Booth has executed a Deed Poll, and enrolled it in the Chancery Division of the High Court. (See *Lea v. Cook*, 34 Ch. D. 528, where the constitution incidentally came before the English Court of Chancery.¹) Of course the Roman Catholic Church adopts the old

¹ It is in this way the Church of England has developed a Canon Law of its own. See Bishop Stubbs' *Lectures on Mediæval and Modern History*, p. 335, published since this paper was written.

Canon Law, and has added to it as was necessary; but in disputes between members of that communion, our Courts only accept this as having been adopted by the parties by private compact. In like manner the Scottish Episcopalian Church has framed canons for itself, and every person who joins that communion expressly or impliedly agrees to abide by these canons, in so far as they may not clash with the law of the land.

In all the systems of Canon Law developed subsequently to the Reformation, we find traces of all the various branches into which our ordinary municipal law is divided. We have—(1) a substantive law relating to the clergy, churches, manses, stipends, etc. When questions on this subject come before the secular courts, it is as a branch of the law of contracts. The Canon Law must be proved like a private contract or a foreign law. Their law of procedure is a part of the ordinary law of arbitration. We have also a sort of conveyancing in the ordination and translation of ministers, and in the consecration of churches;¹ (2) we have a criminal law in the forms of discipline which deal with sins; and (3) we have constitutional and administrative law, dealing with the relations of the governing bodies and their members; and (4) we have inter-ecclesial law (if I may be permitted the privilege of making a word), dealing with conflicts of rights and the recognition of foreign rights: baptism by clergy of other Churches; recognition of members of other Churches in communion; and lastly, the recognition of the orders of other clergy themselves, as in the Mutual Eligibility Acts of the Free and United Presbyterian and English Presbyterian Churches, and in the mutual recognition of the Scottish Episcopal, English, Irish, Colonial, and American Episcopalian Churches, with the occasional recognition of Roman, Greek, Abyssinian, Armenian, and other Churches. Private international law may indeed be said to have taken its rise in the comments by Bartolus and others on the first title of Justinian's Code *De Summa Trinitate*, in which he recognised the decrees of the Councils already referred to. But in the writings of the Schoolmen Soto and Suarez, we see questions of jurisdiction discussed as between Churches; and the maxim *Locus regit actum* uniformly applies to forms of worship, though it should be in such a small matter as using human hymns, or particular psalm tunes or chants. This of course implies mutual recognition, which holds between different national Churches as it does between the nations themselves and their Governments. And within one State we see individuals belonging to different Churches—Catholics, Episcopalians, Presbyterians, Independents, Baptists, and many others, with different personal ecclesiastical laws, mixing freely without clashing, just as Hindoos, Mohammedans, Christians, or Buddhists, with their personal *civil* laws, mix freely in the East. No doubt with us the collisions are generally solved by the court

¹ See Ross's *Lectures*, ii. 244, as to points in Scotch conveyancing borrowed from ecclesiastical sources.

applying the civil law, and declining to recognise the ecclesiastical, by declaring—

“Non nostrum tantas componere lites.”

But the absence of collisions between our Civil and Canon Laws may be explained by the fact that the substantive Canon Law of all our Churches is held to be in entire accordance with our municipal laws; and the formal portion of their Canon Law is intended to be, and always is, in perfect harmony with our municipal law. This will be apparent when we consider, as I am now about to do, what is the *Corpus Juris Canonici* of the Presbyterian Churches. The old *Corpus Juris* being swept away at the Reformation, the Churches had to fall back on the original source of the Canon Law—the Bible, with the interpretation which had been put upon it in their Creeds; and so the Presbyterian *Corpus Juris Canonici* includes—(1) the Bible; (2) the Westminster Confession of Faith, and the Larger and Shorter Catechisms; and (3) the Books of Discipline, and the Acts of the Assembly, which contain their constitutional law and law of procedure. In so far as these deal with sins, they are most comprehensive. The commentary on the commandments in the Larger Catechism spreads a net, the meshes of which are too small to let anything escape. The gloss on the eighth commandment, for example, would reach any fraudulent bankrupt that the utmost ingenuity of the most skilful draughtsman could invent; and while the Civil Legislature is passing Criminal Law Consolidation Acts, and Criminal Law Amendment Acts, the Church can point to its Code, and say, We have dealt with these offences long ago.

There is, however, one chapter whose presence in the Confession demands an explanation, and that is the one on Marriage and Divorce (ch. xxiv.). In the Thirty-nine Articles of the Church of England there is no corresponding Article, except as to the marriage of priests. But the explanation is simple: it is a survival of the Canon Law, which did not distinguish between civil and ecclesiastical rights. Marriage was one of the sacraments which was not obligatory on all the faithful; and when you see how largely the subject bulks in the old *Corpus Juris*—for the subject seems to have been an interesting and a tempting one to professional bachelors—you cease to be astonished that this chapter has found its way into the Westminster Confession. The subject had no place in the old Scotch Confession. (See Dunlop, ii. 21.)

There is one other chapter (xxiii.) which deals with the relation of the Church and the civil magistrate—or may we not rather say, the conflict of the Canon and the Municipal Law. The questions raised in this chapter have hitherto been answered, and for the future apparently must be answered, by the Municipal Law—by the people grouped as a State, and not as a Church or Churches; and so they lie beyond the scope of this paper.

So much for substantive law; but substantive law is in-operative without laws of procedure and sanctions. These are principally supplied by an Act of Assembly of 1707, session 11, which is the main code of procedure for the Established and the Free Church to this day. The United Presbyterian Church in May 1848 adopted brand-new rules for itself; but even in them, as I shall show, we have some traces of the old Catholic Canon Law.

There is a very interesting compend of Presbyterian Canon Law, published in 1709, by Mr. Walter Steuart, under the title of *Collections and Observations Methodized, concerning the Worship, Discipline, and Government of the Church of Scotland*. In his dedication to Sir John Maxwell of Nether Pollok, he refers to the confusion which prevailed in Church judicatories, after the Revolution of 1689, for want of fixed rules. And in his preface he says, "If there be yet among them (*i.e.* the office-bearers in this Church) any want of uniformity or exactness in the exercise of the Discipline, Worship, and Government thereof, it may not without ground be imputed to our not training up the students of Theologie, *ex professo*, at universities, in the knowledge of these, as well as in her doctrines. Therefore, to prevent all grounds for fearing of such ignorance, and the bad effects thereof, it were fit that professors of divinity were enjoined to give their scholars lessons on these subjects. And till a better compend be composed, these collections are humbly offered, to be recommended by professors to their students." The work, like that of John Paul Launcelott, follows the main lines of Justinian's Institutes, so far as applicable. The first book treats of Church government, which principally concerns her office-bearers and judicatories (*i.e.* on ecclesiastical persons). The second is concerning the worship of God and sacred things, with what relates to the maintenance thereof (*i.e.* *De Rebus Ecclesiasticis*). The third and fourth books treat of Church discipline: the one concerning errors and scandals, and the other about the method of reclaiming and censuring the erroneous and scandalous. If we omit the titles of Launcelott's Institutes referring to civil procedure, and divide the fourth book into two, the order is identical with Steuart's. Steuart was a genuine Canonist, and knew the old Canon Law, and his Bible and Confession, and the Acts of Assembly, as well as the Civil and Municipal Law. His quotations from, or references to, Scripture are quite as irrelevant as any made by Fathers, Popes, or Councils. Take the following from Book II. Pt. 5. § 7: "Errors in the substantials make void the consent, unless future consent supervene, as it did in Jacob, who supposed that he had married and received Rachel, but by mistake got Leah, yet was content to retain her, and serve for the other also." If any Scottish Jacob, even though he were an elder in the Kirk, were to succeed in carrying out such an arrangement, he would probably find that he would have to serve for the other also, but his service would

probably not be in the open air of the desert, nor would his occupation be so entirely congenial to him as sheep farming was to Jacob. The third book, as we saw, treats of offences. The titles are 14 in number, and treat the following subjects:— (1) apostacy and atheistical opinions of Deists; (2) of Papists, Quakers, and Bourignianists; (3) of schism and prelacy; (4) of witches and charmers; (5) of blasphemy, cursing, profane swearing, and lottery; (6) of the profanation of the Sabbath; of not observing fast and thanksgiving days; of withdrawers from, and disturbers of the public worship and observers of superstitious days; (7) of slandering and assaulting ministers; beating and cursing parents; and injuries personal and real; (8) bribery, partiality, and negligence of judges; (9) of deforcement of officers (*i.e.* of course Church officers); (10) of murder, parricide, duels, and self-murder; (11) of incest, adultery, bigamy, rapes, etc.; (12) of penny bridals, promiscuous dancing, stage players, immodesty of apparel, drunkenness, tippling, and acts in general against profaneness; (13) of theft, sacrilege, usury, falsehood, beggars, and vagabonds; (14) of art and part.

If we compare the list of sins here dealt with by the Church, we shall find it is not unlike the list of crimes dealt with by the State, given by Sir George Mackenzie; but the treatment and the punishment were different. Thus a murderer must suffer death, however penitent he may be; but he may die in the odour of sanctity and in the bosom of the Church. The object of Church censures is stated in the Confession and elsewhere to be—(1) for the reclaiming and gaining of offending brethren; (2) for the deterring of others from the like offences; (3) for purging out that leaven which might infect the whole lump; (4) for vindicating the honour of Christ and the holy profession of the Gospel; and (5) for preventing the wrath of God, which might justly fall upon the Church, if they should suffer His covenant and the seals thereof to be profaned by notorious and obstinate offenders. The first two really include the others, and the last is the old Greek idea that an offence committed against the gods by an individual brought down their wrath, not only upon the offender, but upon the whole community. This may account for the severity of ecclesiastical punishments. In the Presbyterian, as in the Roman Catholic Church, these were, after reproof, the greater and the less excommunication. In plain English, or perhaps rather in modern Irish, this was simply greater or lesser boycotting. In the lesser excommunication the person is suspended from Church privileges, or, if a minister, is deposed from office; but the greater is more severe. By § 15, chap. viii., of the Act of Assembly 1707, the minister, “in the name and authority of our Lord and Master, doth in *verbis de præsenti* pronounce and declare him or her excommunicated, and shut out from the communion of the faithful, debarring that person from their privileges; and, in the words of

the apostle, delivering that person over to Satan." By § 17, "After the pronouncement of this sentence, the people are to be warned that they hold that person to be cast out of the communion of the Church, and that they shun all unnecessary converse with him or her; nevertheless, excommunication dissolveth not the bonds of civil or natural relations, nor exempts from the duties belonging to them." Now all this about handing over to Satan you will find in a quotation from a sermon of St. Augustine, contained in the second part of the Decree, Cause xi. quest. 3, chap. 32, who shows that since you are out of the jurisdiction of Christ in the Church, you must be in the jurisdiction of the Devil, who reigns everywhere outside. His words are: "Omnis Christianus, dilectissimi, qui a sacerdotibus excommunicatur, Sathanæ, traditur; quomodo? Scilicet, quia extra ecclesiam est diabolus, sicut in ecclesia Christus ac per hoc quasi diabolo traditur qui ab ecclesiastica communione removetur. Unde illos, quos tunc Apostolus Sathanæ esse traditos predicat, excommunicatos a se esse demonstrat." But how much milder our excommunication is than the old Catholic one, may be seen from an epistle of Pope Calixtus, quoted in the same division of the Decree, chap. 17, where it is stated that no one is to communicate with the excommunicated "in oratione, aut cibo vel potu, aut osculo," "nec *Aræ* eis dicat," for whoever knowingly does such acts makes himself liable to the same condemnation. Here is boycotting with a vengeance!

The United Presbyterian Church in its rules (p. 75) takes a much more humane view of excommunication, for it does not even keep up the old formulæ. The rules provide that "The sentence in all cases is to be publicly intimated to the Church, that her members may avoid all familiar intercourse with the person excommunicated, although it does not dissolve natural or civil bonds, or exempt from the duties of common humanity or Christian kindness." And they add: "Because it involves no civil pains, the world and the individual himself may ridicule the sentence, and regard it with indifference; but to a mind properly impressed with its solemnity, it will be viewed in a very different light." Walter Steuart puts the same observation with more humour when he says: "Let not those who deserve it, or upon whom it hath been orderly and justly inflicted, mock and say, *Parturiunt montes, etc.*" (p. 305).

Any one who has had anything to do with the election or translation of ministers, or elders or deacons, in any of the Scotch Presbyterian bodies, knows the important part which is filled by edicts. No step of any importance is taken without an edict narrating what has been done, and intimating to all and sundry that the court (it may be kirk session, presbytery, or synod) will on a certain day proceed to carry out a certain ceremony, or ordination, or translation. Thirty years ago this identical practice prevailed in the Commissary Court in the appointment

of executors, but was abolished by the Act 21 and 22 Vict. cap. 56. Erskine (*Inst.* iii. 9, 31) explains the form of proceeding thus: "The Commissary, at the suit of any person having interest in the executry, issues an edict, which serves as an intimation to all concerned that they may appear in Court on a particular day specified in the edict, nine days at least from the publication of it, to see the testament of the deceased confirmed. This edict, as in the case of all edictal citations, need not be served against any one personally, but is affixed on the church door of the parish where the deceased resided; and if he died in a foreign country, *animo remanendi*, citation must be used upon it at the Market Cross of Edinburgh, and pier and shore of Leith, against all that may have any interest or claim in the executry." When, therefore, you see a beadle at a church door bawling some public intimation to nobody in particular, you must remember that this is the ecclesiastical ceremony corresponding to the civil one, which was enacted when a messenger-at-arms went down to Leith, and there, for the benefit of all foreigners, addressed the heedless winds and waves.

In our civil courts we give decree in absence after one citation; and even in our criminal courts an accused may be outlawed after only one citation. But by the Act of Assembly of 1707 an accused person is only held to be contumacious after *three* formal citations, and the same rule holds in English Canon Law. The United Presbyterian Church is satisfied with two. But citations *apud acta*, as they are called,—*i.e.* where, in the course of proceedings, and in presence of the court, a person is required to attend a diet,—are peremptory, and, if neglected, imply contumacy. In the Established and Free Churches the same tender regard seems even to be paid to witnesses. Now you will find in Holy Scripture ample authority for so dealing with offending brethren. But the anxiety of the Church does not stop here. Further intimation is made under the same Act of Assembly, chap. viii. § 9. As Walter Steuart explains: "If he contemn these three citations, then he is to be admonished out of the pulpit, to appear and submit, three several Sabbaths, and a presbytery diet should intervene betwixt every one of those admonitions. By these admonitions intimation is to be made that the presbytery will proceed to inquire into the guilt, although the delinquent be absent, and threatening him with the highest censure of the Church if he continue impenitent; and therefore the minister is gravely to admonish the party, present or absent, to repent and submit himself to the discipline of the Church. § 5. If, after all, the person continue impenitent or contumacious, the presbytery appoints the minister to pray for him publicly in the congregation, and he is to exhort them to join with him in prayer, that God would deal with the soul of the impenitent, and convince him of the evil of his ways. Which prayers of the Church are to be

put up three several Sabbath days, a presbytery intervening betwixt each prayer. § 6. The scandalous person still continuing impenitent, and making no application or submission, the presbytery is then to appoint the minister to intimate their resolution to proceed upon such a Sabbath as they shall name for pronouncing that dreadful sentence, unless either the party or some for him signify some relevant ground to stop the procedure."

The new procedure of the United Presbyterian Church is not nearly so precise in its requirements; and it is easy to see that the older form is just a continuation of the pre-Reformation system. By a decree of Pope Sylvester (*Decretum*, part ii. cause 5, quest. 2, ch. 2) it was provided that, in the first instance, the accused should be called paternally, no licence of any ecclesiastical matter being denied to him. After an *induciæ* of seven days, he was to be cited again, on a further *induciæ* of the same length, but this time licence to enter a church to hear service was interdicted. Then two days were to be allowed, in which he was suspended from the peace and communion of the Holy Church. Then two other days were allowed to lapse in the same way. And finally, after waiting another day, when his compliance was despaired of, the accused was to be struck with the sword of excommunication. ("Quibus uno die superaddito, omni expectatione veluti jam desperata, reus mox anathematis gladio feriat.") The United Presbyterian procedure is therefore simpler and better, if excommunication is to be retained at all. The solemn warnings were intelligible when the Church had the power of real punishment, but the retaining of the preliminary flourishes, when the real end of the transaction is forgotten, appears to be meaningless, and can only make the Church ridiculous in the eyes of the world.

From this mode of procedure it may be understood how a case may come actually to pend for a considerable time in ecclesiastical courts, without anything in the form of an indictment being served upon the accused. You may remember how the Robertson-Smith case in the Free Church was well discussed before a libel was demanded or tabled. The aim is first of all to settle scandals; if possible, privately and extrajudicially. If, for any reason, this cannot be done, then they may be settled by the court, after hearing parties informally. If this too fails, then a libel becomes necessary. Now this follows exactly the order of the old Canon Law, which, like the Roman Civil Law, had first a process of summoning—in *jus vocatio*; and then when the accused appeared, he was served with a formal libel, to let him know exactly of what and by whom he was accused. This was the *Libelli oblatio*. The compressing of the two steps into one, and the abolition of the numerous citations, are in accordance with a clearly established law of legal development, which makes for simplicity and brevity.

By the Canon Law, before a litigation commenced, the

parties, and in some cases their representatives, had to take the oath *de calumnia*, that there was no fraud in the action. This survives now only in civil actions of divorce. But there is another oath which has been retained by all the Presbyterian Churches—the oath of purgation. When a person is under discipline, he may in some cases offer to swear as to his innocence. The form is given in the Act of Assembly 1707, cap. iv. The United Presbyterians have shortened it a very little, and made it a little more business-like. This was commonly known as the Canonical purgation, as contrasted with the vulgar purgation of cold water, hot iron, and single combat, which were forbidden by the Canon Law as mere temptations of God (*Decretals*, v. 34 and 35; Launcelott, iv. 2). But the oath of purgation could only be administered when no evidence was forthcoming, and it would be a hardship to the accused to lie under such slander.

Who could be witnesses? The Canon Law had rules of its own, and excluded the testimonies of infamous persons and others. The practice of all our Churches in this matter appears to be lax. Dr. Cook, in his *Church Styles*, assumes as a matter of course that the Municipal Acts dealing with evidence apply to the procedure of the Church Courts. We may pass this in the Establishment, for it is putting its Canon Law on precisely the same relation to the municipal law, as the mediæval Catholic Law stood to the Roman Civil Law; but if the other Churches are to be consistent, they should adopt the Acts expressly, or make legislative regulations for themselves, though they may practically find it unnecessary. If the Act permitting accused persons to be examined is passed, it will be curious to see if it will be tacitly adopted by the Free and United Presbyterian Churches, as well as by the Church of Scotland. It must be remembered, however, that from the system which I have described,—of citing a person and discussing the charge before the service of a libel,—the Church Courts already possess the advantage of hearing all the explanations an accused person can give in his own defence.

The usual *induciæ* in Church cases for parties is ten days. This is also the time allowed by all the Churches, even the United Presbyterian, for appeals from the lower to the higher courts. This period was introduced by Justinian in his 23rd Novel, which is also incorporated verbatim in the *Decretum* (ii. 2. 6. 28). This is one undoubted relic of Popery or Erastianism, which has lasted 1300 years.

As you are aware, counsel and agents practising before the secular courts are permitted to practise before the courts of the Established Church, but are expressly excluded from those of the two other Presbyterian Churches. We may charitably assume that this is because these Churches wish canonists and not civilians to plead before them, and though advocates are doctors of *both* laws, yet their knowledge of Canon Law is in general only honorary.

But it seems from Steuart's book, that at the beginning of the eighteenth century this exclusion was enforced also in the Established Church, but he grounds it on the fear that "pleas would probably be more frequent and tedious too; and the truth hath been many times expiscate by the countenance, behaviour, or expressions of parties themselves, which would have been concealed by advocates" (p. 280). There is a slight ring of the Holy Inquisition about this last observation. It was evidently a part of the policy which contrived to dispose of scandals, without formal libels and trials, by the confession of the parties.

But this exclusion of advocates as pleaders does not prevent all the Churches choosing an advocate as law adviser, and also an agent. These are invariably elders. In the Established Church the advocate so chosen is called the procurator for the Church, and appears for it in civil causes. Steuart is uncertain whether Her Majesty's Advocate be not also by his patent constitute advocate for the Church, but there can be no doubt as to this now-a-days. It is too common for a Dissenter to be Lord Advocate to admit of such a rule being recognised.

There is one institution worthy of note, and which I have been unable to trace in the old Canon Law. That is the five years' prescription of scandals, introduced by the Act of Assembly, 1707. This rule is borrowed also by the United Presbyterian Church, in cases of discipline. The prescription of crimes in the Roman Law was one of twenty years, introduced by a law of the Code (ix. 22. 12. *Ad legem Corneliam de falsis*). This was apparently adopted by the Canon Law, as we may gather from Merlin (*Repertoire*, ix. 633), and it has been incorporated with most of the common law of Europe, and is actually recognised in Scotland. But Sir George Mackenzie, in his *Criminal Law*, says that adultery (which was a capital crime in his day) and *peculatus* prescribe in five years, though he gives no authority for this doctrine; but it may be traced to the Roman Law (D. 48. 5, C. 9. 9. 5), and it appears to have been introduced by the *Lex Julia de adulteriis coercendis*. It is evidently from this rule that the Churches have borrowed their five years' prescription. It is probable the rule might be generally recognised in Mackenzie's day, for he lived just a few years before the date of the Act of Assembly introducing the prescription; and it is just possible the rule might be borrowed from Mackenzie's own work, for he was the great authority in criminal law till his book was superseded by Baron Hume's standard work. It is interesting to note that, by the French, Italian, and Belgian penal codes, there is, besides the common vicennial prescription, a quinquennial prescription, which applies to certain classes of crime.

I have now more than exhausted the time allotted to me, though I am very far indeed from exhausting my subject. I might have discussed the patronage of livings, the *jus devolutum* at the end of a six months' vacancy, the erection and disjunction of parishes,

and many other subjects in which the old Canon Law has left traces on our modern ecclesiastical law. It might have also afforded subject for an interesting lecture, how far the doctrines of the Civil Law have been filtered through the Canon Law before they were adopted by the Scotch Law. We might have spent a very profitable hour comparing the list of maxims in the title "*De Regulis Juris*," at the end of the *Digest*, with that in the sixth book of the Decretals of Boniface. But I have, as it were, picked up only a few pieces of ore where the seams cropped out on the surface, and I trust that some of you will be encouraged to explore the rich historical treasures which lie concealed beneath. To the lawyer the Canon Law must be interesting, not only as a study in comparative jurisprudence, but also as exhibiting an attempt to combine the highest results of legal science, as developed in the Roman Law, with the purest equity enforced by the Christian religion. To the theologian or Churchman the Canon Law must be interesting as the actual source of much of the law which he is called upon to administer. And lastly, to the historian the Canon Law affords glimpses of social life and social relations, domestic, ecclesiastical, commercial, political, and international, which are of priceless value, since the record of such facts is an unconscious one.

PRIVATE BILL LEGISLATION.—II.

BY R. VARY CAMPBELL, ESQ., M.A., LL.B., ADVOCATE.

(Continued from page 81.)

II. MODIFICATIONS HITHERTO ADOPTED.

THE evils of the present arrangements as to Private Bill Legislation have long attracted public notice. Preliminary local inquiries by departmental inspectors were tried for a year or two after 1846 as to certain classes of Bills, but failed, because Private Bill Committees would not accept the inspector's reports, and insisted on going into all the evidence anew for themselves. Public men, such as Lord Brougham, in 1860, and Mr. Dodson, in 1872, have tried to induce Parliament substantially to hand over its jurisdiction in Private Bills to outside tribunals, and have failed, either because the times were not ripe for the change, or because their proposals were thought to go too far in withdrawing Private Bills from Parliamentary control. The scheme of leaving part of the Parliamentary business analogous to that of Private Bills, viz. the determination of election petitions, to the ordinary courts, has been successful; and, as has been already noticed, Divorce Bills are now for the most part superseded by the institution of an English Divorce Court. But while the question of the proper treatment

of Private Bills in general has met as yet with no general solution, there has grown up, without much notice or systematic regulation, a plan of Provisional Orders which, since its introduction in 1845 for the Inclosure Commissioners, leaves the initiation and practical decision upon various local schemes, requiring Parliamentary authority, with some Government Department. The manner in which these Provisional Orders are obtained and made effectual is, in general, by an application to the Department fixed by the statute giving the power to settle Provisional Orders. The Department orders a local inquiry, sometimes conducted by the Sheriff, as under the General Police Act, 25 and 26 Vict. cap. 101, sec. 79, but usually left to be managed entirely according to the discretion of the Department, as under the Public Health (Scotland) Act, 1867, sec. 30; the Tramways Act, 1870, sec. 7; the Artisans' and Labourers' Dwellings Improvement (Scotland) Act, 1875, sec. 6; or the Electric Lighting Act, 1882, sec. 4. On the Department being satisfied that the conditions of the authorizing statute, and of the departmental rules or practice thereunder, have been fulfilled, a Provisional Order is settled, embodying the scheme of the promoters with such modifications as may have been found necessary. The Department thereafter introduces, at the public cost, and without payment of House fees by the promoters, a Bill into Parliament to confirm the Order, which only thereby obtains statutory authority and effect. The Bills confirmatory of Departmental Provisional Orders go through the ordinary stages of Public Bills, and are generally, but not necessarily, accepted by Parliament, and passed without opposition. If opposed, they may, as to any Provisional Orders covered by any Bill and objected to, be referred to Committees, and are then treated in the same way as opposed Private Bills. These Provisional Orders, requiring as they do the statutory consent of Parliament to their validity, proceed upon the principle, congenial to British usage and tradition, that Private Bills should each be passed by the Legislature in the same way as proper Public General Acts, and should not, as generally in France and other continental countries, be merely administrative decrees. Provisional Certificates, which are valid unless objected to by Parliament, are limited to certain special cases, and are comparatively unimportant. The plan of proceeding by Provisional Orders, and one departmental inquiry, instead of a double trial before Lords' and Commons' Committees, has been largely used of late years wherever it has been permitted by statute; insomuch that it is believed there are nearly as many Provisional Orders every year as there are Private Bills. The Local and Private Acts for the three years 1883 to 1885 were 180, 203, and 160 respectively, excluding Acts confirming Provisional Orders. The Provisional Orders for these years were 271, 176, and 146 respectively. For the more sure working of these Provisional Orders, some of the Departments concerned have issued most

valuable codes of instructions to intending applicants, dealing not merely with points of form, but also with the substantial merits which a local scheme ought to present, in order to its approval in the shape of a Provisional Order. This plan gives, no doubt, a considerable saving of expenses when Parliamentary powers are necessary for local undertakings; but it can hardly be regarded as sufficient to meet the evils attendant upon Private Bill Legislation generally. It must be borne in mind that even in these matters, such as tramway schemes, regarding which Provisional Orders are competent, it may be found necessary, or most expedient in practice, and in view of threatened opposition, or in order to procure more extensive powers than the Department can sanction, to proceed by way of Private Bill. The weakness and inadequacy of the Provisional Order plan to meet the whole difficulties of Private Bill Legislation, consist in the jealousy still felt against extending the powers of the Executive, and the inability of the Departments to provide any judicial inquiry, hearing, and determination sufficiently satisfactory to dispose of serious opposition.

III. LOCAL INQUIRIES.

Here, then, there is, in the shape of Private Bills and of Provisional Orders requiring statutory confirmation, a large mass of Parliamentary business deserving better attention and regulation. It is a burden to members of the Legislature in its present methods, and it unduly takes up the time of Parliament, which ought to be devoted to its proper general public duties. The present conditions on which it is conducted are such as involve the maximum of expense and trouble to promoters and objectors. Its growth into its present shape is a comparatively modern accident, arising out of some vague traditions as to the power and duty of Parliament to inquire into and remedy the private wrongs and difficulties of particular persons at a time when the Crown or the Peers were too powerful to yield to anything but a threat from the united Commons to stop the supplies. The question, and the only question is, how this mass of importunate business is to be most thoroughly done. It is of more importance than appears at first sight to insist, even at the risk of wearisome repetition, on this being the true question. It is not at all a question of producing something to gratify the eye of the poet in a wild frenzy rolling, nor yet to please the lofty soul of the professor intent on such high matters as the Kosmos and the eternal fitness of things. Scotland's share in the business is already not trifling, as becomes not the least wealthy nor the least enterprising of the three kingdoms; and it is a share which is sure to expand under a reasonably improved system. Even now Mr. Shaw, in his paper on Scottish Private Bill Legislation, finds "that, on a most

moderate calculation, Scotland as a whole pays for the luxury of being the most grievous sufferer by this most grievous judicial system, no less than £192,864, or say, in round figures, £200,000 every year." There is no need, however, to call for the Blue Blanket, and to revive the dubiously romantic and plainly uncomfortable raids of the Border. England and Scotland are, with the steadfast consent of all our wisest forefathers, and all their descendants who are worthy of their forbears, indissolubly united; and though flesh and blood sometimes stir with anger at the stolid presumption, which, contrary to law and fact, calls everything and everybody pertaining to the United Kingdom by the name of English, that has nothing to do with the sober consideration of how Private Bill Legislation can be most thoroughly conducted. Indeed, when Scotsmen meet to discuss this matter, they invariably find that they are at one in interest and feeling with what some Londoners altogether impertinently call the Provinces. There is no law of the universe, and none even of the British Union, by which London shall perpetually be the sole centre of such affairs as are the subject of this paper, any more for Manchester and Liverpool than for Edinburgh and Glasgow. The British Parliament is not a merely London institution; and the Cockney assumption, that there is no wisdom out of London, is quite as much resented by the so-called English provinces as by their hearty friends and well-wishers in Scotland. The question again is, How is this piece of business called Private Bill Legislation best to be done? and it may be safely believed that our brethren in South Britain have just as little reverence for the overweening claims of Londoners as we in North Britain can possibly have. London is not all the world, nor even all Great Britain; and the London Parliamentary Bar, which has grown up around what the *Spectator* calls the present wasteful, costly, and stupid system of Private Bill Legislation, will learn as well from the English Provinces as from Scotland, that the interests of the country at large, and the time of Parliament, are not to be indefinitely sacrificed to its parasitic patrimonial interests. These interests are, however, strong and influential with a Parliament which is apt to see, rather confusedly, in any proposed improvement of Private Bill Legislation, an attack upon its corporate dignity and privileges. The Government is pledged, no doubt, to look into the subject and to propose reforms; but nothing is more foolish than to underrate the mere *vis inertiae* of Parliament, and the private influences brought to bear against any proposal from Scotland and the so-called Provinces to remove Private Bill inquiries from London. These influences have been sufficient to wreck, year after year, the Bills of Mr. Craig-Sellar; and it has become necessary to success that the Provinces and Scotland should unite to convey a tolerably distinct intimation that, though everybody is quite willing to submit to the British Parliament,

there is a distinct objection to maintaining a bad system merely for the sake of London, or rather of a handful of specialists living in London, and to whom Bradshaw presents no more difficulties than to Provincials. To the London skilled witnesses, as one important class connected with the present system, it is probably immaterial whether the official inquiry shall be in London or in the locality affected; inasmuch as they must, in any event, if retained to give evidence, go to examine the proposed works *in situ*.

Some of the so-called legislation upon Private Bills ought, on the larger view of modern jurisprudence, to be annexed to the ordinary Courts. All of it might conceivably be left, without detriment to any one, to these Courts, with the assistance of special juries, under general rules to be fixed beforehand by the wisdom of Parliament, in a general statute similar to the Lands Clauses and Railways Acts. Such is often done, in not unimportant States of the American Union, in the practical application of what American lawyers call the State's Eminent Domain. But it is not necessary or desirable, for present practical business purposes, to shock so far the pedantries which guard the conferring of statutory powers on local undertakings. Parliament in its two Houses wishes to be supreme over such schemes: and there are reasons why the ultimate appellate jurisdiction should remain with it under the forms of legislation and of the three readings in both Commons and Lords. The salutary abnegation involved in the following clause from the Election Petitions Act of 1868, is not suggested for all measures of private interest coming before Parliament: "The House of Commons, on being informed by the Speaker of such certificate and report or reports, if any" (that is to say, of the decisions of the judges upon election petitions), "shall order the same to be entered in their journals, and shall give the necessary directions for confirming or altering the return, or for issuing a writ for a new election, or for carrying the determination into execution, as circumstances may require." This regulation has worked well, and has prevented the recurrence of the numerous scandals arising out of the wayward decisions of partisan Committees upon election petitions. It is not desired, however, that Parliament shall, in like manner, and to quite the same extent, submit to the judgments of the new tribunal on Private Bills; but it is suggested, as the essential condition for efficiency, that Parliament in either House shall not interfere with the reports and determinations of any Private Bill Commission, unless in exceptional cases, and upon the gravest cause shown. If this essential condition cannot be fulfilled, it is mere beating the air to consider any plan for local inquiries into Private Bills; and the public will simply be where they were on the former experiment of Parliamentary inquiries by departmental inspectors, that is to say, exposed to the trouble and expense of a

local inquiry, which means nothing, and receives no real respect or consideration from the Committees of Parliament. Assuming the willingness of Parliament to be relieved of its Private Bill labours, the difficulty is to find some means of taking the inquiry at the Committee stage of a Private Bill, which shall at once be satisfactory to the public, and shall serve the legitimate purposes of both Houses, and dispense with the present device of a double trial: first, to prove the Bill to the Commons, and second, to prove the same facts to the Lords, or *vice versa*, according as the Bill begins in the Lords or the Commons. The difficulty is not so great as it appears at first, if it is remembered that all that is wanted for business purposes is to secure at the Committee stage of a Private Bill, beginning in either House, the reference to a tribunal which shall be so constituted as to secure the confidence of the country in the efficiency of its one trial of the preamble and clauses of the Bill, subject only in exceptional and grave cases to an appeal to either House on the third reading. The inquiry should in all Bills be local, and never in London, except as regards merely London Bills. It is the very first principle of any improvement in the present anomalous state of Private Bill Legislation, that the decisive inquiries should be conducted before the local public which is interested, and not, as at present, exclusively in London; and nothing less will satisfy the just demands of the so-called English Provinces and Scotland, and nothing else will produce any satisfactory result in relieving Parliament from the necessity of appointing Private Bill Committees. It may be added that the new Court or Commission should not possess the much-praised merit of being an unpaid, and therefore an amateur and undisciplined body, conscious always of its superior virtue in devoting itself to public business gratuitously. Good work requires and deserves its proper wages; and the Houses' fees already exacted for Private Bills are, as has been seen, quite large enough to afford any necessary payment to those who shall relieve Parliamentary Bill Committees of their functions. The fluctuating composition of these Committees, and the endless chances for or against a Bill, which their newness to semi-judicial work affords, are not merits but defects, on any sober estimate. What the country, apart from London, is seeking, is a Commission, not so rigidly bound by precedent as the ordinary Law Courts, but at the same time not quite so capricious and uncertain as the chance Peers or Commons who sit on Private Bill Committees. Local Legislative Assemblies, or the temporary and occasional sitting of the Scottish members in Edinburgh, if not sufficiently objectionable on higher grounds, could yield for the purposes of Private Bill Legislation nothing better than ordinary Private Bill Committees of Parliament, and would in all probability result in something even much worse than these Committees. The objection is to the dilettante composition of the present Committees, and to

Parliament burdening itself with local details outside of its proper business, quite as much as to the undue centralization involved in the present system. To transfer the powers of Private Bill Committees to the ordinary judges alone is not likely to be satisfactory; on the other hand, to constitute any Commission, without due provision for judicial training at its head, would be simply disastrous. There is wanted a new Court or mixed Commission, which shall combine as well the benefits of legal training as of skill in technical matters and in general business. For the immense Private Bill business of the English Provinces, it would not be difficult to frame a Commission which should meet all these requirements, and should hear and determine all questions of Private Bill Legislation locally. With the bad example of the Railway Commission before our eyes, which has power to sit, and ought to sit, anywhere in the three kingdoms, and which in fact restricts its sittings to London, it is necessary, in the business interests of Scotland, to insist that a new Court or Commission shall be instituted for Scotland, which shall have for its special function to inquire and report to Parliament on all applications for statutory powers from Scotland, and which shall be bound to hold its sittings in Scotland, in or near to the localities specially affected by the proposed measures. A judge of the Court of Session, or other competent lawyer, and two persons of large experience in affairs, such as an engineer of eminence, and a man of business, such as the Chartered Accountants could readily supply, would form a Commission deserving and receiving the confidence of the country on all Scottish measures. A certain flexibility might be given to the composition of the Scottish Commission, according to the various requirements of the local schemes coming before it. It should relieve the Departments of inquiries as to Scottish Provisional Orders, as well as the Committees of Parliament of inquiry upon Scottish Private Bills. Its inquiries should be conducted locally, and its reports should be received as final and conclusive in all but the rarest possible cases. It would hold its trials independent of the session of Parliament; and the technicality by which Bills drop with each session, and have to be begun anew, if delayed beyond the session of origin, would be disregarded, as well as the necessity of proving the same facts twice, once for the Lords and again for the Commons. The principle contended for, apart from all merely practical details, is that all Scottish applications for statutory powers, whether in the form of Private Bills or draft Provisional Orders, should be remitted for local inquiry and report to a Court or Commission for Scotland, so constituted as to command the confidence of the country, not only for its impartiality, but for its competency to master the legal, technical, and financial details of any and every local scheme. The reports of this Commission, issued after due trial and hearing, should in general practice be final, but yet not beyond Parlia-

mentary control or revision. The institution of such a Commission for Scotland would not only introduce system and regularity in business where at present everything is confused and uncertain, but would go far to satisfy some reasonable complaints against the absorption of Scottish local business in London. Its effect in relieving Parliament of much heavy labour, outside of the proper function of Parliament, would be not less beneficial than its influence in promoting steady progress in Scottish local improvement, undeterred by the present almost prohibitive expenses of Private Bill Legislation.

It is not to-day, nor was it yesterday only, that the subject was first stirred. Attention has been directed to it in Scotland on various occasions of late years. Mr. Craig-Sellar has brought in Bill after Bill, and Government, which is pledged to deal with the question, last session gave notice of a motion for a Joint-Committee of both Houses in order to consider the best means of relieving Parliament of Private Bill Committees, in accordance with the resolution of 1886. The Faculty of Advocates lately appointed a Special Committee, with instructions to communicate with other Scotch public bodies on the matter. The question, to use a current phrase, is now tolerably mature. If its solution, in the direction of substituting a Parliamentary Commission sitting locally for Parliamentary Committees sitting in Westminster exclusively, is attained, it is a great additional recommendation to the course proposed, that it is only part of what may well turn out to be one of the most important improvements of the century—the better organization of Parliament as a whole, so as to restore to it full efficiency and vigour for the discharge of its proper public duties to all the three kingdoms. To many people, indeed, the claims of proper public business on Parliament, and the necessity for better hours and better arrangements for the conduct of that business, may well seem by themselves amply sufficient to justify the transference of Private Bill Committee work to a Commission sitting locally, apart from all consideration of the increased encouragement which would thereby undoubtedly be given to local enterprise and improvement.

The substitution of a single for a double trial, of local for London inquiries, and of a Commission specially selected and paid to do the work well, for chance Committees who take up the business loosely and leisurely as a mere incident of their attendance upon Parliament, would greatly reduce expense to promoters and objectors, and be highly satisfactory to the local public. But though not one penny were to be saved to the suitors for or against Private Bills, it would still be of the highest consequence, in view of the increasing pressure of public business, that Parliament, while retaining its full right of Imperial supervision and central control over local schemes in general, should give up the attempt to sit by its Committees in judgment upon local details.

OWNERSHIP AND PROPERTY

BY PROFESSOR BLUNTSCHLI.

I.—PRELIMINARY DEFINITION.

By Ownership of property we understand the *Right of full dominion on the part of a Person over a Thing*. This conception includes only the corporeal dominion which expresses itself in the actual holding, use, and enjoyment of the thing, and the power of disposing of it. Ownership of property is an economic private Right; it is the private Right of holding a thing as one's own. The essence of Property, the kernel of it, lies in the justified having and enjoying of a thing.

Before the Ownership of property was apprehended and recognised by the peoples as a Right, *Possession* was known and practised. Possession is the original preliminary stage of Property; it is as such the *actual* seizure and control of things by men. The acquisition of property in moveable things is still entirely dependent on the occupation or seizure of unappropriated things, and on the transfer of possession in things which are acquired by social intercourse. Possession is also the regular effect of property or ownership. The owner is entitled to claim and to exercise at all times the possession of the thing which belongs to him.

Hence there exists a natural connection between possession and ownership. Possession is actual, ownership is rightful, dominion of the person over the thing, as the Romans have already correctly seen (*L. 1, § 1, de adq. vel. am. poss.*). At the beginning, the still uncivilised primeval men, like the savages of to-day, took actual possession of a cave for their dwelling, of wild beasts that they had slain or caught, of fruit-trees and roots for their nourishment, of stones and pieces of wood for their defence, and of skins of beasts for their clothing. This was hardly anything more than occupation, a process which is practised even by the beast of prey towards the weaker animals, and by the birds when they build a nest.

Many political economists make *Labour* the basis of ownership in property. This view, however, is contradicted both by the history of property and by the nature of its relations. Labour has certainly worked in a fruitful and ennobling way upon the possession and value of appropriated means and the use of things; and this applies not merely to the creative labour which produces new things, or makes existing things more useful and more beautiful, but also to the careful preserving and purifying guardianship and maintenance of them. With increasing civilisation, the part taken by labour in the development of property has continually increased, and the brutal power of seizure in primary occupancy has lost in importance. Nevertheless, labour, which is the activity of a person, or a momentary externalization of personal life, has no immediate reference to the idea of ownership in property, in so

far as it consists in the lasting relation of the person to the thing. After it has been performed, labour is no longer existent; it is no longer perceivable as labour. In so far as it has enhanced the value of the thing, its effect remains in the thing; but it no longer exists as labour. Moreover, it is a very uncertain and wholly insufficient standard of the *value* of things. The value of things to men depends on their use and enjoyment, on the wants of men, and the present powers of satisfying these wants, and not on the number of working days or the industry which has been spent upon them. If labour were really decisive for the acquisition of ownership, then the specification of things through the form given to them would be the chief formal condition in the acquisition of property. This, however, is only an incidental condition of it, which is very rarely applied. The natural and the usual equivalent of labour, is the *wage* which the worker receives.

It was only when men became conscious of their natural superiority over the things which they had in possession, and which they used, and when the acquisition and having of things were recognised as a necessity in the order of peaceful relations, that the actual dominion over things was raised to a Right, and became ownership. So long as might alone prevailed, there was no proper ownership. Ownership was constituted by dominion being ennobled and established by rightful Law.

Accordingly ownership of property is not a mere product of nature, but of human civilisation. Neither, on the other hand, is it a gift of the State. The explanation of property as arising from *Positive Law*—as given, for example, by Montesquieu and Macaulay—does not explain the idea of it, and it is besides an extremely dangerous view. If the ownership of property rested only upon the will of the legislator, it might just as easily be subjected by the arbitrary resolution of the legislator to a new division, or be entirely annulled. Property is only safe in idea if the legislator, as well as every citizen, is conscious that it has a natural foundation independent of the State. It is not originally derived from the State; it is not a part of the public Right. In an eminent sense, it belongs to the sphere of private Right. Even barbarian tribes of hunters and fishers, unsettled nomads, and solitaries who have withdrawn themselves from the society of men, may have property in their clothes, dwellings, and utensils. However, the enhanced protection of property, and the development of it, have only been attained in the State, and by the aid of it. So far the question of the ownership of property has undoubtedly become an important political question; and it is further so in as far as the mode of the division of property and the growth of property exercise an important influence upon the welfare of the people and the State. On this account care for the property of the individuals is one of the most important functions of the State.

II.—SKETCH OF THE HISTORY OF PROPERTY IN MOVEABLES.

In the period of the childhood of humanity, instinct already led men easily to the process of appropriating certain *moveable* things. The fruits which they plucked, the wild beasts which they caught or slew, the stone implements which they selected, the skins of animals with which they clothed their bodies, and the branches of trees with which they covered their huts, belonged to them. The ownership of man in moveable things as his property, is almost as old as man himself. Driven by personal wants, he made himself master of them; and in getting possession of them, he became at the same time conscious of his natural supremacy over them. He learned that things are naturally subservient to the disposal of persons; and there dawned in him an idea of rightful dominion over things, that is, of ownership.

This primary ownership in moveables is, moreover, closely connected with the *real possession* of them. The feeling of dominion can, at the beginning, only be awakened and assert itself in the actual *exercise* of dominion. If the wild beast that had been caught escaped from the power of the hunter, with the possession of it his ownership was also at an end. And, in like manner, when the fruits which he had gathered, or his weapons, were stolen or robbed from him, he was rarely in a position to get them again; and thus with his possession of them the feeling of his ownership also passed from him. A thing was his so long as he had power over it. It was no longer his when another possessed it. Among barbarian peoples the distinction between possession and ownership did not become clear, just as it is still difficult for children and uneducated people to realize it. The distinction only reached complete clearness in the Roman Law, which protected ownership (*dominium*) through entirely different legal means than those that were applied to possession (*possessio*): the former being protected by actions at law (*rei vindictio, actio negatoria*), the latter by police regulations, prohibitions, or interdicts. The German Law of the Middle Ages knew the distinction, but effaced it again in its "Ideas" (*gewere*) and "Process," and brought ownership into greater dependence on possession than held in the Roman Law. The close connection and relation of possession with ownership in moveable things, is also still very manifest in the legal development of the present time. At present ownerless things are still appropriated by seizure or occupation; and fleeing game escapes at once from our possession and our ownership. The regular transfer of property is continuously conjoined with delivery of possession. From undisturbed continuous possession ownership still arises; and if certain requisites of *bona fide* acquisition vouch for the possession, it is then preliminarily protected like ownership. From possession there still springs a presumption in favour of ownership. Further, according to several of the modern

systems of Right, a permissive possession in trust on the side of the owner has so strong an influence, that from this point the *bona fide* possession of a new third party acquiring it is even better protected than the original ownership of the lender, who was deceived in consequence of his trust being misplaced.

Ownership in moveables is, therefore, in a high degree transitory and changeable, like the things to which it relates. The attempts of various ancient peoples to withdraw certain specially valuable or individually usable things from this free and easy movement, and to bind the commerce with them to more rigid forms, were shown, for instance, in the prescriptions of the ancient Roman Law with reference to the so-called *res Mancipi*, which could not be transferred to an owner by transfer of possession, but only through solemn acts before witnesses or before the magistrate (*mancipatio* and *in jure cessio*). An instance of the same kind is found in the Northern German Law, which bound the exchange of cattle stamped with the house-sign to the cognisance of special witnesses drawn together for the purpose. These attempts have not been able to maintain themselves in face of the development of civilisation, which lays value upon easy exchange from hand to hand, both of possession and of ownership. All these limitations of transfer have shown themselves, in the course of time, to be partly burdensome and obstructive, and partly to be ineffective. These forms have been introduced in order the better to secure ownership in such individual things, and to make it, as it were, more lasting. But when once social intercourse has come to full activity, the owner lays more value upon the fact that, according to his pleasure at the moment, and without being compelled to give any account to his friends or enemies, he be able freely and conveniently to trade likewise in such things, and to exchange them for other goods, than upon the very doubtful greater security promised to him by these public forms. And as "moveable" things are all easily removed from their place, and thus withdrawn from controlling oversight and concealed, these forms give no aid at all against dishonest alienation. They are accordingly felt in later times as an impediment, and as endangering *bona fide* commerce; and then they are set aside either expressly or by desuetude.

The holding of property in moveables, wherever it has become valid, is very energetic and simple. These things, to a great part—such as edible fruits—are, by their nature, destined to be consumed by the enjoyment of man. A second great mass of other things—such as articles of trade and fabrics—are made by man specially in order that they may be subservient to his free will. In taking them into his hand and manifesting his power over them, he can ennoble, transform, and destroy them, according to his will. His dominion over them has, therefore, an unreservedly despotic character; the thing itself can oppose no limit to this

dominion; it must serve him entirely and wholly, and even to its destruction. The material elements of which it is composed do not indeed perish, but the thing formed out of them does. And, as a rule, there appear to be no limits put by society or the State to the individual in this respect. The supremacy of the person over the thing—of the human mind over a piece of matter—is thus manifested here in its full strength; and we do not wonder that the universal view of Right since the Romans, has regarded this property in moveables as an *absolute Right of dominion* on the part of the individual over the thing, and as the most absolute of all human rights.

It was only in respect of living things or *animals*, that any hesitation could arise in this relation. But as the ancient peoples, in the feeling of unlimited supremacy, regarded even slaves as things, and asserted absolute power over them, they gave still less regard to the natural claims of animals; and the advancing civilisation had difficulty enough to protect the personality of serfs and servants against their oppressors, and to maintain them from being put on a level with the beasts. It was not till recent times that civilisation at last began to show compassion even to domestic animals, and to protect them in some measure from the irrational and purposeless cruelty of their owners.

Ownership in moveable things has received an important extension in the modern system of law by *bills of value*, which primarily establish obligatory claims of a creditor and a debtor,—being treated in exchange, like things. Thus we speak of possession and ownership in the paper of bills, shares, orders, and even of certain bonds, the paper which represents the claim being regarded as a thing, and the value of the claim being ascribed to the paper. When the possession of it is transferred, and new ownership of it acquired, the value of the claim and the claim itself are transferred with the paper.

The possession of moveable things passes easily from hand to hand; and on this account the commercial intercourse has obtained even a stronger influence upon the transfer of ownership than the durability of the property itself would lead one to expect. The Romans, indeed, still held firmly by the principle, that property once acquired cannot, as a rule, be lost contrary to the will of the owners, although the thing may fall into other hands. It was only by a short period of prescription, and the real protection which was vouchsafed to the *bona fide* possessor against every one, with the exception of the owner, that they attempted to satisfy the requirements of the actual commercial intercourse. The German system of Law, on the contrary, protected the *bona fide* possessor, even against the owner, if he had anyhow entrusted the thing to another person, and thereby exposed himself in some measure to the danger of its alienation. This view has become the ruling one in the present day. The French Law has partly

misunderstood it, and partly transformed it, by separating the transition of ownership entirely from the delivery of possession, and by grounding it merely on contract, which, however, is essentially a relation of person to person, and not of person and thing.

(To be continued.)

COMMERCE AND CONTRACTS.

BY PROFESSOR DIODATO LIOY, UNIVERSITY OF NAPLES.

I.

1. INDUSTRY cannot be conceived as existing without Exchange. Even in the patriarchal state, the individuals produced for the family, and not each one for himself. Commodities then formed almost the only product, and services were regarded rather as a form of work than as a matter of exchange. By degrees wants increased, and it became necessary to provide things required for the use of the clan, of the village, etc., and thus the effect of concurrence began to make itself felt.

It is not only products or services that are exchanged for other products or services, but almost every human relation may *sensu lato* be called an exchange. Thus the Romans were in the habit of including in the *jus commercii et connubii* all the civil right which by degrees came to be conceded to the Plebeians. Vico thinks that in the earliest times all the clients were called *nexi*, as being *bound*, for the word "nexum" signified obligation, as appears from the text of the XII Tables: "Cum nexum faciet mancipiumque," etc., and the contractors were called *nexi*.

Modern society is distinguished from that of the early ages by the great number of its relations of Contract. In primitive times the individual did not enjoy any separate right by himself. He obeyed certain rules of action which were imposed upon him by the conditions under which he was born. The individual members of a family could not enter into contracts, because the family would not have taken any account of the obligations which might have been imposed upon them. The heads of the family were able to undertake obligation for it; but it happened very rarely, and with such formalities, that the slightest inobservance of them produced the nullity of the obligation. Examples are to be found in the history of the Roman Law, which show us how the Romans began to dispense with one part of the ceremonial, and how the other parts were simplified, and how it was allowable to pass entirely from them under certain conditions. Thus it came about that certain contracts could be made without any ceremony, and they were properly those on which the activity and energy of the social relations depended.

2. The Roman scholars¹ defined the "*nexum*" as *omne quod geritur per æs et libram*. The first use of the *nexum* was to give solemnity to the alienation of goods, and it then came to be applied to the contract, which was considered as an incomplete sale. When the subject of the contract was not to be forthwith executed, the *nexum* was regarded as artificially prolonged in order to give time to the debtor. From the *nexum* four forms of contracts took origin: Verbal Contracts, Written Contracts, Real Contracts, and Consensual Contracts. It was only to these four classes of contracts that obligatory force was given, and in the case of any of the first three it was necessary to observe certain formalities, as the simple consent of the contracting parties did not suffice. In the verbal contract the *vinculum juris* was established by means of a stipulation, that is, a demand and a reply: the demand came from him who received the promise, and the reply came from him who promised. In the contract by writing an inscription was entered in the account-books of the families and on tablets, and in the real contract it was necessary that the delivery of the thing should be a subject of preliminary agreement.

In the course of time Real Contracts were distinguished into *nominate*—as *mutuum*, *commodatum*, *depositum*, *pignus*, and *in-nominate*, according to the formulæ, *do ut des*, *do ut facias*—*facio ut des*, *facio ut facias*: many contracts of this kind receiving such special names as *permutatio*, *precarium*, the *contractus æstimatorius*, which consisted in a commission to sell a subject, and the *contractus suffragii*, the purpose of which was to obtain some favour from the prince by means of remuneration given to a courtier or to another person of high position who was not obliged by his office to perform the act in request.

Four *Nominate Contracts*—*mandatum*, *societas*, *emptio-venditio*, *locatio-conductio*—belong to the class of consensual contracts, the consent of the parties being sufficient to render them complete without the need of any formality, and on this account they were derived from the right of nations (*jus gentium*).

Besides Contracts there were also *Facts* in use, which did not induce civil action. Many of these, however, obtained civil authority from the Prætors (*pacta prætoria*), from the Imperial Constitutions (*pacta legitima*), or sometimes they were immediately adjoined to contracts of good faith (*pacta adjuncta*).

The Roman Law has always distinguished Obligation from Convention. It defined the former thus: *Obligatio est vinculum juris quo necessitate astringimur ad aliquid dandum vel præstandum vel faciendum vel non faciendum*; and it defined the second: *Conventio est duorum pluriumque in idem placitum consensus*. Looking

[¹ "*Nexum* Manilius scribit omne quod per libram et æs geritur, in quo sint mancipi; Mucius Scævola, quæ per æs et libram fiant, ut obligentur, præterquam quæ mancipio dentur. Hoc verius esse, ipsum verbum ostendit, de quo quæritur. Nam idem quod obligatur per libram, neque suum sit, inde *nexum* dictum."—VARR.]

to the origin of Obligations, they were divided into three classes, according as they arose *ex contractu*, *ex delicto*, or *ex variis causarum figuris*. The last class was subdivided according to the analogy which they have with a contract or a delict into obligations *quasi ex contractu et quasi ex delicto*. They arose from a reason of natural equity acknowledged by the law, as when the captain of a vessel binds the owner, the agent, the merchant, etc. The Quasi-contracts comprehend the carrying on of the affairs of others (*negotiorum gestio*), tutory (*tutela*), curatory (*curatela*), the acceptance of a succession (*additio hereditatis*), the administration of a thing which has accidentally become common or of a succession still undivided, and the payment of a debt not yet due. The Quasi-delicts are acts of negligence which result in harm to others.

Some more recent Jurisconsults make obligations spring *ex facto*, *ex lege*, *seu ex æquitate*, and they include the contract, as also being a fact, in the first class.

Among the interpreters of the Roman Law, it will be enough to refer to Domat and Pothier, who have freed this part of the Roman Law from the rubbish of the past, and have introduced into it as much of Customary Law as was necessary. The compilers of the French Civil Code only reduced their treatises to Articles.

3. According to the French Civil Code, conventions are obligatory by the simple consent of the parties, without its being necessary that there be delivery of the thing or the execution of the act on the part of one of the contractors, or any extrinsic formality.¹ In principle this is contrary to the Roman Law, according to which, as a general rule, the consent of the parties is not sufficient to render a convention civilly obligatory (§ 2, *Inst. de Oblig.* 3, 13).

Contracts are divided in the Civil Code into *unilateral* and *synallagmatic (sensu lato)*, according as one of the parties is bound by obligation to the other without that other party being bound, or according as the two parties are bound reciprocally towards each other. These Synallagmatic Contracts are subdivided into *perfect* and *imperfect*, according as the prestations to which the parties are bound are or are not considered to form the equivalent of each other. The perfect Synallagmatic Contracts are commutative when the equivalent consists in a certain advantage for each of the parties; they are aleatory when the equivalent consists either only in reciprocal probabilities of gain or loss, or in a probability conjoined with an advantage that is certain for one or other of the parties.

Contracts are also distinguished into contracts with an *onerous*

¹ The French Code requires a notarial act for donations, contracts of marriage, constitutions of hypothec, and surrogation without the consent of the creditor. The Italian Civil Code—wholly like the French Code as regards the matter of contracts—requires the notarial act only for donations and nuptial deeds.

title, and contracts with a *gratuitous* title, or contracts of beneficence. Contracts are of an onerous title when the advantage which they procure for one or other of the parties is conceded only by means of a prestation that is executed or promised. Contracts are of a *gratuitous* title when they secure to one or other of the parties some advantage independent of any corresponding prestation. Synallagmatic Contracts are all, and necessarily, of onerous title; but Unilateral Contracts are not always contracts of beneficence.

Contracts are called Contracts of Acquisition or of Guarantee, according as their object is to increase or simply to guarantee the patrimony of the two parties, or of one of them. They are nominate or innominate, according as the law does or does not indicate them under a special denomination. The rules established by the Civil Code for contracts in general are applied to all contracts, whether they be nominate or innominate; but the rules that are particularly laid down for the various nominate contracts are applicable only by analogy to innominate contracts.

The Quasi-contracts are licitous (allowable) and voluntary facts, from which there result, of full right, either certain unilateral obligations on the part of him who performs them, or certain reciprocal obligations towards those to whom such facts have brought damage or advantage. The Civil Code in respect of quasi-contracts speaks only of the *gestio negotiorum*, or the receipt of *indebitum*. Nevertheless the administration of a particular thing still undivided among several persons who are not united by a social relationship of contract, when it is taken up without mandate by one of the beneficiaries, presents all the marks of a quasi-contract. The other quasi-contracts found in the Roman Law are embraced, according to the classification of the French and the Italian Civil Codes, in the category of Legal Obligations.

Every human activity may be the subject of contract, as a prestation may consist either in the prestation of a thing or in the accomplishment of an act. A contract which is without a subject, or which has in view a prestation that is physically impossible, is considered as non-existent. The subject ought to be determined at least in its Species, and it ought to offer some pecuniary advantage to one of the two contractors, without which the execution could not be demanded in court, as all questions of doing resolve themselves into questions of giving. Finally, the subject ought to be licitous, or, in other words, it ought not to be contrary either to moral custom or to public order. The cause ought to be true and licitous. The existence of the contract is proved by testimonies or by titles, according to the amount of the sum and the circumstances in which it was instituted. All the subjective conditions requisite for the validity of contracts, will be treated in the sequel.

4. Almost contemporaneous with the compilation of the French

Civil Code, Kant was occupied with the classification of contracts from the purely philosophical point of view.¹

Kant's classification has been retained by Hegel, by Ahrens, and by Gans, but Gans observes that it does not contain the contract of Society. Trendelenburg, in his *Naturrecht*, has tried to give another simpler Classification of Contracts as follows: "In relation to their objects Contracts have principally in view either a donation (where there is an advantage without a counter-exchange), or a simple exchange (permutation by prestation and counter-prestation), or an agreement with regard to a common affair (Society). These three Species of Contracts have this in common, that they represent originally an agreement of different wills. In contrast to these there is a species of contract which aims at resolving a plurality of claims which have already arisen in a commercial relation, and which consequently tends to a division (transactions)."

(To be concluded in next number.)

A LAY OF THE PROCEDURE ROLL.

ONCE on a time an agent did
A case to me entrust;
And glad was I one night to see
Upon my table (with a fee)
Instructions to adjust.

Before the Ordinary Lord
I entered shy yet glad;
And filled with pride was I, because
My agent stood behind. (He was
The only one I've had.)

"And will your Lordship," I observed,
With pleasure in my soul
To meet a judge thus face to face,
"Close the Record, and send this case
To the Procedure Roll?"

"Close, and Procedure Roll," said he,
And I, quite happy-hearted
To hear the words his Lordship said,
With future speeches in my head,
From out his bar departed.

¹ Kant's Classification of Contracts will be found in the recently published translation of his *Philosophy of Law*, pp. 122-41. It is only in order to economize space that it is here omitted.

The following Monday in the Rolls
My case stood number eight:
I thought it really most absurd
That, till those other seven were heard,
My cause should have to wait.

That week my papers and myself
Were never far apart.
I read them many times a day,
And in a fortnight I could say
The whole Record by heart.

Proofs, jury trials, and debates
Each day the Macer bawled.
I often hoped, alas! in vain:
For six long months of anxious pain
That case was never called.

My health broke down; the doctor came,
And ordered me to bed.
Vacation came and passed away,
And there for eighteen weeks I lay
With closely shaven head.

At last I rose. I called a cab,
Up to the Court to drive;
And when I reached the Place of Law,
Oh, joy! upon the board I saw
My case was number five.

"Come for a cruise," my uncle said
(My uncle had a yacht),
We'll circumnavigate the globe,
And bring you back to wig and robe
In time." 'Twas kindly thought.

I smiled a feeble smile of thanks,
But thought upon the whole
Parliament House the only place
For any one who had a case
On the Procedure Roll.

My uncle sailed away alone,
All countries to explore;
When he returned two years had fled,
And then to him I sadly said,
"My case is number four."

That case has never yet been called,
 The parties are deceased ;
 The agent, who had sent the fee
 Which caused me once such heartfelt glee,
 Is dead six years at least.

Defender's counsel and myself
 Are old and weak and grey,
 Each day that weary floor we pace,
 And hope in vain our only case
 May be announced some day.

The judge is very, very old,
 But fresher far than I,
 For, should he live a thousand years,
 Till that Procedure Roll he hears
 He would not dare to die.

But whether I shall live as long
 I have the greatest doubt
 (My learned brother thinks the same) :
 Before our case is reached, the flame
 Of life will flicker out.

I only hope that when I die,
 My liberated soul
 Will reach some quiet, peaceful place,
 Where there is neither Court nor case,
 Nor yet Procedure Roll.

Obituary.

THE LATE MR. THORBURN, ADVOCATE.

GREAT regret has been felt, not only by members of the legal profession, but also by very many citizens of Edinburgh and Leith, at the premature death of Mr. William David Thorburn, advocate, which occurred on Sunday evening, the 19th January, at his residence, 16 Heriot Row, Edinburgh. In the spring of last year he had a serious illness, which so reduced his strength as to prevent him attending the Parliament House during the summer session of the Court. He was, however, able to resume his professional practice at the beginning of the winter session, although, as his friends regretted to observe, with his natural force abated. His physical condition became gradually worse,

though he was not confined to the house for more than a few days. He was able to go out in the forenoon of Saturday the 18th; but in the afternoon of that day his illness took an acute form, and in the evening he passed into a state of unconsciousness from which he never emerged.

Mr. Thorburn, who was born at Leith on 20th January 1846, was the eldest son of the Rev. Dr. David Thorburn of South Leith Free Church, a highly respected and estimable gentleman, who, after a career of fifty-five years as an ordained clergyman, is still able to minister occasionally to an attached congregation. His paternal grandfather was a well-known merchant in Leith, and his maternal grandfather was an equally well-known ship-owner there, to whom is attributed the credit of obtaining the charter for the Trinity House of Leith.

Mr. Thorburn received his early education at the High School of Leith, from which he passed into the Edinburgh Academy, where he highly distinguished himself. He then became an alumnus of Edinburgh University, and, after going through the curriculum in Arts, graduated with honours in classics in 1866-67, and gained the Greek Travelling Scholarship. This necessitated his residing one year at a German University for the study of German and Greek philosophy, and he accordingly attended the Universities of Heidelberg and Bonn.

Mr. Thorburn joined the Scottish Bar in the year 1870, and soon became known to the inner circle of the legal profession as a thorough and conscientious lawyer, specially conversant with commercial law. His practice, however, was never so large as his abilities entitled him to expect. He was appointed legal assessor for the burgh of Leith, and this office, of little pecuniary value, was the only legal appointment he ever held. He contributed several valuable articles to this journal. In 1881 he edited the 4th edition of Robertson's Handbook of Bankers' Law, and in the autumn of 1882 he published a Commentary on the Bills of Exchange Act of 1882. The former book exhibits painstaking industry and scrupulous accuracy. The latter book, as we said at the time of its publication, is replete with information on the very extensive subject-matter of the Bills of Exchange Act, and could only have been written by an author possessing an intimate and accurate knowledge of this branch of the law.

Always moderate in his political views, Mr. Thorburn chivalrously joined the Conservative party when its fortunes seemed on the ebb, and was selected as the Conservative candidate for the Leith District of Burghs in March 1884, in anticipation of the general election, which, however, did not take place till near the end of 1885. Although unsuccessful at the poll, he showed such ability, energy, and courtesy as to gain the respect of the whole constituency; and in October 1886 his supporters, in recognition of his valuable services to their party, presented him with his

portrait, a capital likeness, painted by Mr. James Irvine, which may be seen in this year's Exhibition of the Royal Scottish Academy. The protracted electoral contest, however, told upon his health, not very robust even then, and he never quite recovered from the effects of it.

Mr. Thorburn took an active interest in the benevolent institutions of Leith, and also in Chalmers' Hospital, of which he was a director for the last ten years. He was also a member of the School Board of Leith for nine years, during the last three of which he was chairman, and did much good work in those capacities. To him chiefly is due the credit of having judiciously solved the problem of increasing the school accommodation without throwing an undue burden on the community; and on several occasions he delivered interesting addresses on educational subjects, suggesting many practical improvements.

Mr. Thorburn was fond of travel, and in his autumn vacations made himself acquainted with most of the Continent, from Lapland to Hungary. On returning from his tours, he occasionally delivered lectures describing in a most interesting manner his impressions of the countries he had visited.

In July 1886 Mr. Thorburn married a daughter of the late Mr. W. J. Duncan, manager of the National Bank, and she survives to deplore his loss.

From what we have written it will be seen that Mr. Thorburn, though cut off in his prime, has nevertheless done much good work in various spheres, and his is the record of a stainless character. A true and cultured gentleman, with a higher ideal of life than most men possess, and keeping that ideal ever in view, he impressed all his acquaintances with the elevation of his character. But only his intimate friends knew the warmth of his affections, the purity of his thoughts, and the tenderness of his nature. To such friends his loss is irreparable.

Reviews.

Complete Annual Digest of Every Reported Case for the Year 1887.

Edited by ALFRED EMDEN, of the Inner Temple, Barrister-at-Law. Compiled by HERBERT THOMSON, M.A., LL.M., of the Inner Temple, Barrister-at-Law. London: William Clowes & Sons.

WE have again Emden's *Digest*, which we have favourably reviewed year by year. It seems as useful as ever, and as the plan is in other years. It is indeed a comfort to think that the use of it is free from the risk of omitting some important recent

authority. We have already had occasion to consult this volume in a search for recent decision, and were glad to find a full and well-selected digest of Scottish cases on the subject we had in hand.

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, D.C.L., Hon. LL.D. Glasgow, of Lincoln's Inn, Barrister-at-Law, Chichele Professor of International Law and Diplomacy, and Fellow of All Souls College, Oxford. Fourth Edition. Oxford, at the Clarendon Press. 1888.

THE appearance of a Fourth Edition of Professor Holland's *Elements of Jurisprudence*, within eight years of the publication of the work, is a gratifying proof of its popularity and usefulness, as well as an encouraging indication of the progress of a more scientific spirit and method in the department of juristic study in England. This Fourth Edition does not differ in the text in any essential respects from the Third Edition, which appeared two years ago; but it is slightly enlarged, and special attention has been given to the further illustration of its principles and rules by reference to recent English cases. Thus in an Addendum the decision of the case *Sime v. Caird*, in the House of Lords, is referred to in illustration of the question of a Common Law Copyright in an orally delivered lecture. This is merely mentioned as showing that the learned author has been careful to bring his work up to date, and that it is still edited according to its original conception and design.

The great merits of Professor Holland's text-book are now universally recognised, and they have been acknowledged and pointed out in a former notice in our columns. The author's wide range of general learning, his special mastery of Roman and English Law, his firm grasp of International relations, his fulness and aptness of quotation, the subtlety and independence of some of his analyses, and the lucidity and elegance of his style and arrangement, are conspicuous and characteristic marks of all his work. The historical importance of the *Elements* lies in the fact that they have already largely superseded the autocratic reign of Austin in juristic study in England, and that they are working beneficently for the ultimate triumph of a better method. They recognise the narrowness and insularity of the Austinian system; and in supplementing and rectifying it by the vitality and breadth that invariably arise from direct study of the classical sources of juristic science, Professor Holland has done an important work in the cause of scientific Jurisprudence, and has even lifted its whole movement in England into a higher, purer, and more genial atmosphere. The success of his book has thus been well deserved, and all who are interested in the advancement of Jurisprudence must grate-

fully acknowledge the value and ability of the work and effort it embodies.

But while saying so much, we are far from regarding these *Elements* as ideally perfect, or even as unassailable in principle and detail. At the best they represent an energetic but incomplete struggle out of the Austinian system; and if they exhibit the convenience and facility of an eclectic position, they show also its unphilosophical habit and its temporizing adaptations. In short, the *Elements* only advance half-way from the abstract reflection of the Analytical Jurists to the freedom and universality of a truly rational system of Jurisprudence. The powerful aid given to movement in this direction by the results of the recent application of the historical and comparative method to Jurisprudence, have been only drawn upon in a fragmentary and unsystematic way, if not altogether ignored and undervalued. The speculative element has been suppressed in favour of the empirical accidents of English precedent and technicality. The substantial products of continental thought have been treated somewhat cavalierly, and have been only quoted in littles and not always adequately. Austin's doctrine of Sovereignty still usurps the throne of the universal reason and the common conscience of mankind. The wavering distinction between Law and Right is not laid on any solid basis, and it continually yields to the conventional forms of the English legists. The terminology is a sort of piebald, made up of the technical terms of the Roman Jurists and the metaphorical nominalism of Bentham. Such a Benthamite barbarism as "substantive law" and "adjective law" is adopted as a prominent and leading designation of the all-embracing division of Laws into laws regulative of Rights and laws regulative of Procedure. Unity of principle and essential exposition of the jural relationships are too often sacrificed for analytical subdivisions and external conceptions, that find application only in the existing details of English law; while that ideality of apprehension that anticipates and inspires the future, and is the most potent stimulation of young minds, finds but feeble play. These limitations—as we venture to regard them—have of course arisen from no want of power or resource on the part of the learned and accomplished author; and we could have wished only a more independent and thorough application of that power and resource rather than to have seen him use them, according to the Horatian phrase, "varias inducere plumas, Undique collatis membris." In limiting himself, however, as he has done, he has produced a text-book which is all the more adapted to meet the contemporary want, and to be the more widely useful for its time. This indeed gave it occasion and purpose; and in these relations, and viewed as a genuine English production, it still stands unrivalled as a text-book of Jurisprudence for students of English law.

LORIMER. *Principios de derecho internacional*. Traducidos al francés y extractados por ERNESTO NYS, Miembro del Instituto de derecho internacional, Juez, etc. Versión castellana de A. L. LOPEZ COTERILLA, Abogado del Ilustre Colegio, de esta Corte. Madrid. 1888.

Principes de droit international. Par J. LORIMER, Professeur de droit de la nature et des gens à l'université d'Edimbourg, Membre de l'Institut de droit international, de l'Académie de jurisprudence de Madrid et des Universités de Moscou et de Saint-Petersbourg. Traduit de l'Anglais, par ERNEST NYS, Associé de l'Institut de droit international, Juge, etc. Bruxelles: Paris. 1885.

THE appearance of a Spanish rendering of Professor Lorimer's *Institutes of the Law of Nations*, is a fact worth noting in connection with the progress of the study of International Law and the widening intellectual comity of juristic science. The translation into Spanish has been executed by Señor Lopez Coterilla, of Madrid, from the French edition of Professor Lorimer's work published by M. Nys at Brussels and Paris in 1885; and it has been done with care, accuracy, and elegance. The French version is not a mere translation of the English work, but is an admirable adaptation and summary of the substance of the two English volumes, and it has been so reproduced as to exhibit the systematic exposition and argumentation of the original with great clearness and force. An elegant and interesting Preface by Professor Lorimer is prefixed to both translations. Starting with a reference to the Tercentenary of the University of Edinburgh, he indicates the contemporary relation between theology and philosophy in Scotland, the position occupied by Jurisprudence in Scotland and England, and the principles of his own system. These two translations will not only amply maintain the reputation of the learning and thought of Scotland abroad, but will do much to increase the practical influence of those humane and beneficent principles, to the exposition and diffusion of which the learned author has devoted the work of his life, and which he has so ably formulated and systematized.

The Month.

NOTES FROM LONDON.

Thrussell v. Handyside & Co. puts an important interpretation on *volenti non fit injuria*, as applied to a workman's remedy under the Employers' Liability Act. "If the plaintiff," said Justice

Hawkins, "says, as this man practically did : I have to be in this position, unless I throw up my work ; it is my power and not my will that prevents my refusing,—he does not voluntarily take the risk of being hurt."—*Times*, Jan. 30, 1888.

* *

IF the cases of *Finkelstein v. Hodder & Stoughton*, and *Merrill v. The Sunday-School Union* go on to trial, they will rival the *causes célèbres* of last year. The first action arises out of statements made in the *British Weekly*. The subject-matter of the second is an alleged libel on Dr. Merrill by Miss Finkelstein, published in the *Sunday-School Chronicle*. Eminent counsel will appear on either side.

* *

SEVERAL of the West African commissionerships to which I recently called attention are still vacant. The competition appears to languish.

* *

IN the case of *Finlay v. Chirney* the Court of Appeal has had before it the question, Will an action for breach of promise of marriage lie against the executors of a deceased person ? The Master of the Rolls and Lords Justices Bowen and Fry have at length decided—(1) That the action will not lie unless special damage is laid and proved ; (2) that in the latter case the special damage only can be recovered ; and (3) that the special damage referred to must be pecuniary, and within the contemplation of the parties at the time when the promise was made. The purchase of a trousseau would not be special damage. On the other hand, if the plaintiff, to the knowledge of the defendant, gave up a good situation in consequence and in consideration of the defendant's promise, she could probably recover against his executors.

* *

IN *ex parte Jobling*—not yet reported—it seems to have been held that the mere acceptance of the office of director will not make the person so accepting liable as a contributory to the extent of the qualification shares fixed by the articles of association. But comment must be suspended till the authorized version of the case appears.

IN *Fraser v. Hood*, Dec. 16, 1877 (First Division), we have an instance of a servant barred from recovering damages because he had worked in face of a known danger. He had been bitten by a horse in his master's stable, where he was employed as

a stableman. The horse was well known to be vicious. *Per* the Lord President, "He might have declined to touch the horse at all; but notwithstanding his knowledge of the animal, he chose to undertake the duty. Whether he performed it carelessly and recklessly or not is of no consequence; he willingly encountered a known and obvious risk, and therefore cannot recover damages under this action.

* *

It is amusing, but certainly not uncommon, to find a holograph will commencing thus, "In order to prevent all dispute after my death,"—originating an action. The following bequest was held to convey heritage: "I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease, to be absolutely at her disposal" (*Forsyth and others v. Turnbull and others*, Dec. 16, 1887, Second Division).

* * *

THE House of Lords have recently reversed the First Division of the Court of Session in the case of *Stewart v. McClure and others*. The question raised was one mainly of fact, but it involved one of law relating to the burden of proof. Our readers may remember that the action was brought by a client against his agent, for neglect of professional duty. The client had lent money upon the security of a patent which turned out to be worthless, and as to the character of which the agent had been warned. Had the agent duly communicated the warning to his client? The Court of Session held that the *onus* of proving that he had lay upon him, while the House of Lords transferred burden of proof to the shoulders of the pursuer. The client was held bound to show that no such communication had been made. Hence the Courts arrived at different results. The Lord Chancellor, indeed, was in favour of upholding the judgment appealed against, but he concurred with his noble and learned brethren upon the question of *onus*. "It appears to me," he says, "that if the Lord President has laid down the rule that in this case the *onus* was on any one else than the pursuer, he was in error." He then quotes an opinion of Justice Bayley, and a comment upon it by Baron Alderson, which he thinks expresses the accurate rule. Justice Bayley has laid down: "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." Baron Alderson's comment is as follows: "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the weight of the evidence, but there should be some evidence to start it, in order to cast the *onus* on the other side."

IN the case of the *Steel Company of Scotland v. Tancred, Arrol, & Co.*, Dec. 22, 1887 (First Division), an arbitration clause, which referred disputes to the engineer for the time being, was held invalid, in respect that the arbiter was not named.

* *

THE Lord President held this point settled by the last century case of *Buchanan* (M. 14, 593). "It was a unanimous judgment of the Court, and it must not be forgotten who composed the Court, which was a very strong one. It was the Court, of which we know so much in the history of the law of Scotland, presided over by Sir Islay Campbell."

* *

THE mother of an illegitimate child may be held barred from setting aside an agreement, in virtue of which she has handed over her child to be maintained by another party. When the mother is unable to support the child, the Court may refuse to give to her the custody. *Per* the Lord President: "As regards the question of custody, there are other considerations to be taken into account besides the legal title; and the Court has always considered as of importance the interest of the child itself, and its position as regards the possibilities of life, health, and support" (*Sutherland v. Taylor*, December 22, 1887).

* *

LORD M'LAREN has decided one of the first reported cases under the new Criminal Procedure Act. He has held in *H.M. Advocate v. Lyon* (Glasgow Circuit, 26th December 1887), that a panel, who at his own request has tendered a plea of guilty before the Sheriff, and has been remitted by the latter to the High Court, is not entitled when he appears there to withdraw his plea. In other words, the provisions of section 41 do not apply to a case when the procedure has been under section 31.

* *

THE Second Division have recently held that certain parties who had left unfenced a hole full of water, six feet deep, were not liable in damages because of the death of a lad aged sixteen, who had made a raft and was accidentally drowned (*Forbes v. Aberdeen Harbour Commissioners*, January 24, 1888).

* *

IT is competent to appeal to the Court of Session against a judgment of the Sheriff, reviewing a deliverance of the trustee in a process of cessio under the Act of 1880. — *Caird v. Paul*, Jan. 24, 1888 (First Division). The Lord President commented

upon the unsatisfactory nature of the provisions contained in that Act for working out the new process of *cessio* created by it.

* *

Some Opinions on the Fusion of the Legal Professions.—Mr. A. G. Ditton writes to the *Law Journal* as follows :—

SIR,—I have read the letter of Mr. G. B. Gregory, in your issue of this date, with reference to this question, and to the eloquent and masterly speech of the Solicitor-General at Birmingham.

In dealing with the matter, Mr. Gregory takes the view one would naturally expect from a gentleman occupying the position he does in the profession. His clients are rich, and the most talented members of the bar are at his and his clients' disposal; and I have no doubt the present system carries with it no hardship so far as he and they are concerned. But the learned Solicitor-General took a much wider view of the matter than Mr. Gregory does, inasmuch as the case of litigants who are not wealthy did not escape his sympathy and consideration.

It is undoubtedly the fact that many a man has been defeated and ruined in an unequal struggle for his rights against an opponent who, being wealthy, was enabled to use the delays and technicalities of the law as the means of defeating the very object for which the machinery for the administration of the law is established.

Mr. Gregory appears to deal with the question as if it were a proposal to abolish the bar. He will find in the speech of the Solicitor-General no such suggestion, nor have I ever heard that suggestion made. Surely the giving the right to a litigant to be represented in all the Courts by his solicitor will not take away from Mr. Gregory and his clients the luxury of being represented by advocates of the highest standing. For certainly such advocates will always exist, and, as I sincerely hope and believe, practise their high functions with satisfaction to themselves and their clients, and I am convinced that, even when solicitors have the right of audience, in many cases in which they have wealthy clients, briefs will be delivered to counsel much in the same way as at present; but it must be remembered that the present system is so expensive that it amounts to a positive denial of justice to all but the comparatively rich.

Coupled with the question of expense is that of uncertainty, which seems to increase with every recent change. The truth is, that we have far too much theoretical, and not enough practical, application of the broad principles of justice—in fact, the administration of justice requires to be brought nearer to the people, and it is important that the judges should know far more than they are permitted to know, under the present system, of the real facts of the cases brought before them. The cobwebs must be brushed

away, and gross cases of delay and injustice laid bare, the doing of which under the present system is found impossible.

The hearty thanks of every Englishman are due to the Solicitor-General for the broad and generous way in which he has dealt with this vital question.

* * *

ONCE again this much-discussed question comes to the front. Sir Edward Clarke has spoken in favour of it at the meeting of the Birmingham Law Students' Society: the daily papers have characterized his statement as highly important, nay, even assigned to it something of the dignity of an official utterance: leaders have been written on the subject, and reference made to the proposed Sutors' Relief Bill, of which we were favoured with a copy some months ago. The question, indeed, assumes reality, and comes within the range of practical politics.

Fusion—amalgamation of the superior and inferior branches: what does it mean? what results, beneficial or otherwise, will it have on the public, the superior branch, and the inferior branch?

What do the public expect to obtain from it? Cheaper law, lighter bills of costs, saving of counsel's fees. In theory the reform is enticing. The public have a hazy expectation that in future they will, when they want a will drawn, be able to go direct to a *quondam* solicitor, and make sure that the solicitor himself will draw the will, and not send instructions to counsel to prepare it; when they desire to bring or defend an action, they will simply have to call on a *quondam* barrister at chambers, who will forthwith, without the intervention of a solicitor, be able to take their case in hand, and carry it through to appearance in open Court. In the case of the will, the solicitor, of course, will only be entitled to a fee of the same amount as his former bill of costs, less counsel's fee for drawing; in the Court case, the barrister will only have to receive a fee similar in amount to the fee he would have received had no solicitor been employed. This, we believe, is the expectation of the public. Surely, an expectation doomed to disappointment. The *quondam* solicitor will require remuneration for the extra time spent over the drafting of the will; the barrister will need to be paid for his expenses of office and staff of clerks, which the conduct of actions before they appear in Court renders necessary. In the absence of restrictive legislation on this point, both will successfully maintain their claims, and we are convinced that the obvious justice of paying a man higher remuneration for increased work and skill will lead, not to restrictive legislation on the question of costs, but to an increase in the scale. What benefit will result to the public? Possibly—we are far from certain—some slight saving in costs, but it will be but slight.

Again, we believe the public to be animated in this agitation

by another hope : they think—at first sight it appears reasonable—that they will directly interview the man on whose eloquence and skill they stake their interests. Superficial knowledge of the question shows this hope to be but idle. The *quondam* barrister will be the future pleader—by that we mean the lawyer who will devote himself to advocacy—the *quodam* solicitor, the lawyer who will devote himself to the office. Some few men with small practices will be able to interview clients, and also attend the Courts. The busy men, the successful men, will find all their time employed in Court. When the Courts rise they will have neither time—for they must read their cases for the next day—nor inclination to interview clients. No man can crush into the two short hours between 4 P.M. and 6 P.M. such multifarious duties as would fall on the successful Court and office lawyer: to read his next briefs, interview clients, and write the numerous letters which fall to a solicitor,—truly, a Herculean task!

The superior branch, well represented in the "House," what have they to say to it? The leaders will remain leaders, they will change their names alone; from barristers they will become Court lawyers, and by special arrangement between clients and *quodam* solicitors, will still be retained for advocacy work in heavy cases. The juniors—well, the juniors will lose motions and small cases—these, we take it, many *quondam* solicitors would take in hand themselves. The change means the extinction of the junior bar as advocates; even now it is but the necessity for employing them that compels solicitors to have recourse to their services in small and simple applications.

The inferior branch will be chiefly affected, and, as far as we can foresee the effects of the reform, it can only affect us beneficially. Firstly, it will, according to Sir Edward Clarke, improve our social position. In these days of toleration and broad thought, we have a strong opinion on this point: the world now judges a man for himself alone. Probably Sir Edward did not attach this meaning to the word "social position." It will indubitably give us an improved position with the public, who are too apt to consider barristers our superiors in legal knowledge. This latter point is the bitter pill. We have to pass the severer examinations, and yet the public are never satisfied without counsel's opinion.

This leads us on to another result of the change. In future there will be no protection to be obtained by taking counsel's opinion; no protection by asking counsel to advise on title and draw requisitions. Well, if we have to do counsel's work ourselves, it is only fair we should have counsel's fees.

A third point on which the Solicitor-General laid special stress was the present injustice of solicitors having no opportunity of being appointed Solicitor or Attorney-General, or reaching the Bench. The reform will bring judicial appointments within the reach of solicitors. This, after all, is only fair. It has always

struck us as an anomaly that the posts of Solicitor-General and Attorney-General should be held by barristers.

We have at present but dealt with the advantages we shall gain. What are the prejudicial effects we may expect? Simply increased competition in business. The Inner Bar will at first attempt to swamp us, but, being established, we may tide over this competition.

The outcome of the fusion will be the adoption of a system similar to that prevalent in America—the co-operation in partnership of a pleader and a lawyer; the firm of the future will be Messrs. Quondam Solicitor, Quondam Barrister & Sons, and the tendency will be to greatly increase the size of firms. If this fusion comes—if we do adopt the American system—then all we urge is, let us be thorough in our reform, and make advertising legitimate and professional.

If this amalgamation of barristers and solicitors does result from the proposed fusion, the question naturally arises, Will the public find their expectations realized? Will bills of costs be lighter? Will the public interview personally the men on whose eloquence they propose to stake their money or reputation? That these expectations will be fully realized we find ourselves unable to admit. The firm of Messrs. Quondam Solicitor, Quondam Barrister & Sons, will be increased in number of partners, and the immutable law of supply and demand, of which we have lately heard so much, will result in each partner obtaining a reward for his labour and skill sufficiently remunerative to induce him to devote his time to the profession of the law.

By hook or by crook an income—and an income suitable for a man of education—must be found and will be found for each. We do not for a moment suggest that the change will work without—what change has not?—the ruin of some weaklings; it will be but another illustration of the survival of the fittest. In our opinion a scale of charges will be adopted for the remuneration of the services of the whole firm, higher than that at present paid to solicitors, and less than that now paid to barristers; here, as to costs, the expectation of the public will be partially realized.

In a similar way the public will find that they will not personally interview the pleading partner more than once or twice in the course of an action, but they will feel that the information gained by him from his office-partner will be detailed and precise; the communications between the partners will be more personal, and not bound down, by the ribbons of red-tape etiquette, to written briefs and regulation half-hour consultations.

The public will reap the benefit in a direction they expect not. The increased attention paid to their cases by firms with names to make and reputations to lose; the liability to an action for negligence for failing to appear in Court at the proper time,

and the more personal interest which the advocate will possess as pleading partner of the firm acting in the case, instead of merely counsel retained by a solicitor with whose reputation or interests he but slightly troubles himself; these, in our opinion, are the factors which will work to benefit the public.

But why this discussion?

Is not this fusion at best but a shadow—a long shadow of a distant coming event? That depends on the public. That ruthless monster is slowly but surely digesting a fact; in the law procedure there is, it thinks, a middle-man—barrister or solicitor must go—or, so to speak, it hoists us with our own petard—it would perpetrate for us a legal joke—if one does not go, then there must be “merger”—the lesser must be swamped by the greater: it remains for us to prove whether “inferior” and “superior” are synonymous terms for “lesser” and “greater.”

If the public makes up its mind, then Inns of Court may obstruct, Law Societies may object, but they will be but trees, oak trees, “an you will”—before a herd of elephants. The public—the many—viewed generally, has its way; when public and Conservatives are agreed, and Liberals and Radicals not opposed, who shall there then be found on the other side?

We have but touched the skirts of the subject. We had intended to show the defects of the proposed Suitors' Relief Bill; we also had it in our minds to refer to the radical alterations which will be rendered necessary in the present system of legal education. If this fusion takes place—true fusion can only come in course of time, considerable time, looking at the opposition which is sure to meet it—then will arise the opportunity for the formation of a law university on the lines which were foreshadowed in our February number last year.

These and many other points of this vast and, for the profession, all-important change we must discuss at some future opportunity.

—*Law Notes.*

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF FIFE AND KINROSS.

Sheriffs MACKAY and JOHNSTONE.

DAWSON v. RITCHIE.

Public road—Right to cut grass on it.—Held, that the proprietor of the land over which a public road passes is entitled to interdict a member of the public from cutting the grass growing on its sides, or on the road itself: *Observed*, that the Road Trustees could interdict any one from cutting such grass, if the cutting interfered with the traffic on the road.

The facts of the case are stated in the Sheriffs' judgments, and were not in dispute. The question for decision was one of general interest, viz. whether the proprietor of the land or the Road Trustees has right to the grass on the sides of public roads. The Sheriff-Substitute pronounced the following interlocutor:—

"*Alloa*, 21st November 1887.—The Sheriff-Substitute, having considered the process, including the minute of admissions, No. 10 of process: Finds it admitted that on or about the date mentioned in the petition the defender cut and removed grass from the side of—(1) the public road leading from Kinross to Stirling; (2) the public road leading southwards from the said Kinross and Stirling road towards Cleish; and (3) the public road leading northwards from the said Kinross and Stirling road towards Burnbrae Bridge: Finds that at the points where the grass was cut and removed by the defender, the said roads pass through lands belonging to the pursuer: Finds that the pursuer has not proved that the grass belonged to him, or that it was taken from ground belonging to him or in his occupation: Therefore sustains the first plea in law stated for the defender: Finds that the pursuer has no title to sue the present interdict: Recalls the interim interdict granted, and dismisses the petition: Finds the defender entitled to expenses, and remits the account thereof, when lodged, to the auditor of Court to tax and report, and decerns.

(Signed) "TYNDALL B. JOHNSTONE

"*Note*.—The pursuer in his condescendence states that there are portions of land belonging to him, lying outside his fences and alongside the public roads above mentioned, and that the grass was cut and removed from these by the defender. It was on the strength of these averments that interim interdict was granted, as they seemed to imply not merely that the defender had taken grass from ground which lies alongside the roads, and forms part of such roads, although not macadamized, but that he had entered upon lands belonging to the pursuer adjacent to the roads, and cut and removed grass therefrom. If the latter is the meaning of the pursuer's averments, he has failed to prove them. The parties have renounced probation upon the minute of admissions, No. 10 of process. That minute is far from satisfactory. It deals with the breadth and fencing of the roads, but does not, directly at least, clear up the question, whether in point of fact the grass was removed from ground forming part of the public road, or from other adjoining ground belonging to the pursuer. At the debate, however, both parties argued upon the assumption that the grass was really taken from ground forming part of the public road, and therefore in possession of the Road Trustees, and this it is thought must be taken to be the state of the facts in disposing of the case. In these circumstances, I am of opinion that the pursuer has no title to sue for interdict against the defender. The pursuer based his arguments on the fact that he is owner of the *solum* of the road. That is quite true, but the *solum* and the surface (or road itself) are two different things, and the pursuer is here claiming to act as owner of the surface, the property of which is by statute specially vested in the Road Trustees for behoof of the public. The case of *Waddell and the Earl of Buchan* (26th March, 6 Macpherson, 1869), referred to by the pursuer, does not apply to the present circumstances, and does not more than affirm the doctrine

that the *solum* of a public road belongs to the proprietor of the adjoining lands. So long, therefore, as the roads in question continue to be used as public roads, it is only as a member of the public that the pursuer has a right to them; although he may work the minerals underneath, if such exist, provided that he does so in a manner not calculated to injure the roads themselves. If the above is a correct statement of the law on this subject, the pursuer can have no title to sue in respect of his ownership in the roads. Neither has he such a title in respect of possession, the roads being in the exclusive occupation of the Road Trustees. It should here be observed that by the term "Road" must be comprehended not merely the macadamized portion traversed by wheels or passengers, but the whole space within the road fences, or at least the maximum breadth appropriated by the authorities in the formation of the road, more or less free space on each side being necessary for the proper working and repair of the roads. It appears from the joint-minute and the Acts of Parliament produced, that the points on the road-sides from which the grass was taken were within the road boundaries. If, however, this fact ought not to be regarded as admitted, there is at all events no evidence that the grass was taken from the pursuer's ground. (Intd.) T. B. J."

The case was appealed, and the Sheriff pronounced the following interlocutor:—

"*Edinburgh, 11th January 1888.*—The Sheriff having heard parties' procurators, and considered the whole process: Recalls the interlocutor of the Sheriff-Substitute, dated 21st November 1887: Finds in fact—First, that the three public roads referred to in the petition, viz. (1) the public road leading from Kinross to Stirling; (2) the public road leading southwards from the Kinross and Stirling road towards Cleish; (3) the public road leading northwards from the said Kinross and Stirling road towards Burnbrae Bridge, run through the property of Wester Balado, belonging to the petitioner, John Ramage Dawson: Second, that the portions of the said roads in question are within the boundaries of the petitioner's property of Wester Balado: Third, that the defender cut the grass growing upon parts of the said roads where they pass through the property of the petitioner, on the 9th and 11th of June 1887: Fourth, that the said grass was cut at various places on the said roads, more particularly described in articles 3 and 4 of the minute of admissions, No. 10 of process, partly and chiefly on the margins or sides of the said roads not ordinarily used for traffic, and partly on the roads themselves as used for traffic, but all within the portion of ground appropriated for the purpose of roads, and outside of the fences of pursuer's lands: Fifth, that the defender has not proved that he or any member of the public has cut grass in the roads in question except on the occasions challenged by the petitioner: Sixth, Finds that the Road Trustees, under whose charge the said roads are, have not appeared in the present action, and that there is no proof and no ground for presuming that the cutting of the grass at the parts of the said roads in question will in any way interfere with the traffic of the roads: In these circumstances, Finds in law that the petitioner, within the boundary of whose titles the roads in question are situated, has a good title to sue for interdict against the defender: Recalls the interlocutor of the Sheriff-Substitute of 21st November 1887: Repels

the pleas stated for the defender : Finds that the petitioner is entitled to interdict as craved, and grants interdict in terms of the prayer of the petition : Finds the petitioner entitled to expenses : Allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report, and decerns.

(Signed) "Æ. J. G. MACKAY."

"*Note.*—The petitioner is proprietor of the lands of Wester Balado, through which the roads here in question pass, and the portions of them running through that estate are within the boundaries of his title. One of these roads is the public road, formerly turnpike from Kinross to Alloa, and the other road, which crosses the Kinross and Alloa road at right angles at a point on the lands of Wester Balado, was formerly a Statute Labour Road. Both roads are now under the control and management of Trustees under the Roads and Bridges (Scotland) Act of 1878.

"The defender is a cattle-dealer in Kinross, about two miles distant from this portion of the roads. On the two occasions libelled, he admittedly cut grass on parts of these roads situated on the estate of Wester Balado.

"Parties have renounced probation on a somewhat meagre minute of admissions, but there is no real dispute about the facts. The grass in question was cut entirely outside of the various kinds of fences by which the pursuer's lands are enclosed, chiefly on the sides or margins of the roads not used ordinarily for traffic, but partly also on the road proper where the traffic had been so slight as to allow grass to grow. The Road Trustees have taken no part in the dispute. They have statutory powers to prevent grazing by any person, whether the proprietor of the adjoining land or only a member of the public, upon the roads or sides thereof, except where they pass through waste or unenclosed lands, 41 and 42 Vict. cap. 51, sec. 123, incorporating sec. 103 of 1 and 2 Will. IV. cap. 43 ; and if cutting the grass on the sides of the roads would interfere with or obstruct the public right of passage, there can be no doubt that the Trustees could prevent it. As they have not done so, it must be presumed that the grass here in question can be cut without any interference with the traffic. There is no proof of the value of the grass cut, but it was stated to be trifling.

"The question raised was stated by both parties to be to whom the right of cutting such grass belongs. The defender claimed that right as a member of the public ; but he further argued, that whether he had it or not, the pursuer had no right to it, and therefore no title to interdict him from cutting the grass.

"The Sheriff-Substitute has sustained the second of these contentions, and held that the pursuer has no title to sue. This, indeed, was the main contention of the defender before the Sheriff, and is that on which his pleadings are based. He asserts in them that the grass on the roads belongs to the Road Trustees, and not to the adjoining proprietor. He does not, however, plead any lease or licence by the Trustees in his own favour. Indeed it was said in argument that any member of the public had as good a right as the defender, who acquired a preference only by being the first person to exercise it.

"The parties have therefore raised, so far as the Sheriff is aware

for the first time in Scotland, the question whether the proprietor through whose lands a public road passes, has right to the grass on the road-side, and to prevent members of the public from cutting it. The point is settled in England in favour of the proprietor by a series of decisions which will be found in *Glen On Highways*, pp. 291 and 595; *Spearman On Highways*, p. 45. But while this particular point has not been decided in Scotland, the character of the right, on the one hand, of the Road Trustees and the public, and on the other, of the proprietor or proprietors of the land through which public roads run, has been settled by decisions of the highest authority. In *Galbraith v. Armour* (11th July 1845, 4 Bell's App. 374) it was decided that the proprietor of the land through which the road there in question passed, had right to interdict persons who, with consent of the Road Trustees, proposed to lay pipes under such roads. Lord Campbell in that case stated, that by the law of Scotland as well as by the law of England, the soil of the public highways is presumed to be in the co-terminous proprietors, and that 'if a public highway is established by usage over the land of another, the soil is still his with all his former rights, subject to the public servitude which he has suffered to be established.' Lord Brougham concurred in, and Lord Cottenham dissented from that judgment. But since its date it has been recognised as authoritative. Lord Campbell repeated the same view of the Scottish law in *Breadalbane v. Macgregor* (11th July 1848, 7 Bell's App., see p. 60), where he remarked, 'The soil of the road continues to belong to the co-terminous owner. If there are minerals under the road the minerals are his, if trees grow upon the road the trees are his, if there is grass upon the road he may take the grass, subject always to the public servitude. My noble and learned friend said the cattle may nibble as they pass along the drove road, but that is not a matter of right but a matter of accident, and it might be stated in pleading by way of excuse, not as a matter of right. I believe on this point the law of Scotland and the law of England are the same.' In *Moir v. The Alloa Coal Company* (15th November 1849, 12 D. p. 77), Lord Ivory remarked, since *Galbraith v. Armour*, 'The property of the *solum* cannot be claimed by Road Trustees unless where there is actual evidence of purchase *a solo ad centrum*, and here there is no such averment on record.' In *Waddell v. The Earl of Buchan* (26th March 1868, 6 Macp. 690) the proprietor was held entitled to interdict Road Trustees who had taken a portion of his land, and paid the sum found due by a decree arbitral, from working minerals underneath the road. Lord Curriehill in that case said, 'A right of highway confers on the public a right to use the surface for the ordinary purposes of locomotion. The nature of the right is a right to use the surface for the purpose of locomotion by carriage or on foot, but not to exercise any other rights of property. In particular, the public have not the right of property in the minerals or other substance under the surface, and *ad centrum* beyond what is necessary for the support of the road. This is the legal character of the right, however it may be acquired, whether by use or by Act of Parliament, unless there be an express stipulation to a different effect.' In *Sutherland v. Thomson* (29th February 1876, 3 Rettie, p. 485), which related to a servitude of footpath, Lord Ormidale cited *Galbraith v. Armour* and *Breadalbane v. Macgregor*, and quoted the passage from

Lord Campbell's judgment in the latter case which has been above quoted. He also stated that the opinions of the House of Lords were applicable to all public roads, though peculiarly applicable to a servitude road.

"The older doctrine of the Scottish law was different, and more akin to the Roman law, by which highways were *res publicæ*, and their soil public property which had never been appropriated as private. '*Viam publicam eam dicimus*,' says Ulpian, '*cujus etiam solum publicum est non etiam sicuti in privatâ viâ et in publicâ accipimus; viæ publicæ solum alienum est: jus enim eundi, et egendi nobis competit*' (Dag. 43, 8 L. 2, s. 21). Lord Stair, after stating the common use of ways and passages as a use reserved both from the tacit consent to appropriation of private property and by custom, adds, 'The commonity that is of grass and fruits growing upon the highways, followeth the commonity of the ways themselves, but the common use of the natural fruits brought forth without industry, even in proper fields, as of nuts, berries, or the like, or the promiscuous use of pasturage in the winter time, accustomed in many places of Scotland, are no party of this commonity, but are merely permitted as of little moment or disadvantage, and therefore may be denied without injury.' A recollection of this older view of the Scottish law may be found in opinions of certain of the elder Scotch judges, who showed a disinclination to accept to its full extent the doctrine of *Galbraith v. Armour*, that the Scottish and English law were identical as to the right in the *solum* of public roads. Of this Lord Mackenzie's opinion in *Moir v. The Alloa Coal Company* is an example.

"But the Sheriff feels bound by the more recent and authoritative decisions, which, on this point at least, are scarcely now open to question even in a superior court, and certainly not in the Sheriff Court. It must also be admitted that the doctrine of Stair and the Roman law, though reasonable and appropriate to the case of highways whose origin was as old, perhaps older, than the right of private property in land, is not appropriate to the case of public roads which have been acquired by statutory purchase or by prescriptive use. In the case of roads acquired by statute the question is, What extent of right has been acquired by the Trustees for the public? and this may be in some cases a right of full property, but in other cases of less, and generally only what is necessary for the purposes of passage.

"In the case of roads which have become public by prescription, the presumption would certainly be that the right acquired was limited to that of passage, and any incident required to maintain it. This follows from the maxim of prescription, that the possession or use is the measure of the right. Where the roads have been made, and the lands appropriated to them acquired under statute, the doctrine established by *Galbraith v. Armour* is that a similar presumption prevails, and that nothing is taken from the proprietor of the soil except what is necessary to preserve the right of passage. The present is a case of this nature, as appears from the averment in the defences that the pursuer's predecessors and authors were paid or compensated for the land taken for the purpose of constructing the said roads, or at least the portions thereof from which the grass was cut by the defender.

"It is unnecessary to refer to the special clauses of the Kinross Road

Acts, for there is certainly nothing in them stronger if so strong as those relied on in the case of the *Earl of Buchan*, which were held to pass to the Road Trustees only the rights necessary for the purpose of passage.

"It was admitted, in the able argument for the defender, that neither the Road Trustees nor the public could, as against the proprietor, claim any right underneath the surface as of minerals or subterranean way-leave which could be exercised without interfering with the right of passage; but it was contended that the right to the produce on the surface was distinguishable, and passed to the Trustees, or, at all events, could not be exercised without their consent, even where and when its exercise did not in any way interfere with the right of passage. In support of this contention, a passage in Mr. Rankine's work on *Land Ownership*, which sums up the decisions with his usual accuracy, may be referred to. 'It must be confessed,' he says, 'that the doctrine of private ownership of the soil of public roads has been followed out to its logical results with more strictness in England than in this country. According to both systems of law the minerals beneath a road are private, not public or crown property' (Rankine, 1st ed., p. 257). The difference alluded to lies in the extent of a public 'right of use.' Mr. Rankine then notices the opposite decisions given under the English Game Laws, and those of Scotland with reference to trespass. It has been held in England that a person using a highway in pursuit of game by day is a trespasser under the English Statute, while the contrary has been held under the Scottish Act.

"The opinion of Lord President Inglis in the *Elgin Road Trustees v. Innes* (10th November 1886, 24 S. L. R. p. 35) also deserves notice. His Lordship said that the fence of the road there in question, while it might be shifted by the proprietor, being erected entirely upon his own land, yet, so long as it occupies its present position, 'the proprietor, so to speak, abandons to the use of the public all the ground lying outside of that fence.' The fuller and more accurate report in the *Session Cases* (vol. xiv. p. 52), gives this part of the opinion in these terms:—'Everything outside the fence I do not say is dedicated to the use of the public, because I think the defender would be entitled to use his own property so far as consistent with the maintenance of the road by the Trustees; but the fence being on the road, and placed there by the defender as dividing his property from the road, so long as it remains there everything is abandoned by him for the time being.' This opinion, and the Justiciary decisions as to trespass, must be read, however, with reference to the points occurring for decision, which was in the former the legality of a barbed fence, and in the latter what was an illegal entry on the public road. They do not decide anything as to the right claimed in this case for the public, or at all events to the exclusion of the proprietor to cut the herbage on the road.

"The almost universal practice of Scotland, by which the wayside grass is left to passing cattle or horses, or cut by villagers or cottars in the neighbourhood, was also appealed to. But this practice, however common and beneficent, cannot be said to amount to a legal custom.

"The present defender is perhaps scarcely within the class of persons who may claim the benefit of such practice on the score of necessity or poverty. He is a cattle-dealer, it is true, in a small way; but he cut

the grass in question, and maintains his right to continue to do so, for the purpose of his trade.

"The Sheriff has, with considerable reluctance, but in the end without hesitation, come to the conclusion that he must decide the present case contrary to the opinion of the Sheriff-Substitute, and grant the interdict craved.

"The defender has himself no right, unless he can show a right in the public, to the use of the grass or other fruits growing on the sides of the public roads. In the opinion of the Sheriff he has failed to do this. To hold that there is such a right in the public would be contrary to the principle of *Galbraith v. Armour*, and to the opinions of judges as to this very matter of herbage, which a judge in an inferior Court can scarcely disregard, although they do not amount to a decision of the precise point. The same authorities necessarily imply that the right to such herbage, where it can be cut without interference with the right of passage, belongs to the proprietor and not to the Road Trustees, so that the Sheriff-Substitute's ground of judgment, that the pursuer here has no title to sue, cannot be sustained.

"It is somewhat singular that a recent English decision apparently somewhat restricted the doctrine that nothing passes to Road Trustees but the right of passage, and even held they might demise or let the right to the herbage. But this case, *Coverdale v. Charlton* (4 L. R., Q. B. D. 104), was decided upon the terms of the vesting clause in the English Public Health Act of 1875. It related to streets, not roads, and is too special to form any precedent for the present case. In England the case appears to have given rise to a doubt or misinterpretation of the law, which was corrected, as regards highways, by sec. 27 of the Highways Act 1878, as is explained in *Robb v. The Vestry of St. George, Southwark* (L. R. 14, Ch. 785; see also *Spearman On Highways*, p. 11).

"The Sheriff regrets that a question of such general importance has not been raised, in the first instance, in the Supreme Court; but he has felt bound to decide it according to the best view he can form of the law. The value of the subject in dispute is indeed so trifling as to bring it within the jurisdiction of the Sheriff under the Sheriff Court Act of 1876, in so far as it raises a question of heritable property. There has been nothing which can be called possession on either side; but the party who has the *prima facie* title is entitled to interdict against a person in the position of the defender, who has no title whatever.

"The Sheriff would deem it unfortunate if the common practice of allowing passing cattle, or villagers and cottars living on or near the road, to use the road-side grass, were to be interfered with by this judgment.

"The pursuer, it is right to say, disclaimed any such intention, and the good sense and good feeling of proprietors must be trusted not to assert extreme rights. If they do so, the decision in *Winans v. Macroe* (3rd June 1885, 12 R. 1051) shows that there may be room for the application of the maxim *de minimis non curat prætor*.

"The present case does not, so far as the Sheriff can judge, appear to be one for its application. (Intd.) Æ. M."

Act. Johnstone—Alt. Bogie.

SHERIFF COURT OF ORKNEY AND SHETLAND.

Sheriff THOMAS and Sheriff-Substitute MACKENZIE.

January 16, 1888.

GORDON v. CALDERHEAD (INSPECTOR OF LERWICK).

Poor Law—Relief of step-children.—This was an application for relief presented in the Sheriff Court by James G. Gordon on behalf of his wife and children, in consequence of relief having been refused by the Inspector of Poor. The circumstances appear from the subjoined interlocutors and notes. The Sheriff-Substitute pronounced the following interlocutor :—

“ *Lerwick, 1st December 1887.*—The Sheriff-Substitute having heard parties, and considered the cause: Finds that the applicant, James Gourlay Gordon, is an able-bodied man, and that therefore his wife, Mary Ann Poplar Burgess or Gordon, and his child, Joan Gordon, are not legally entitled to parochial relief: Finds further, that Robina Burgess and Thomas Burgess being children of the said Mary Ann Poplar Burgess or Gordon by a former marriage, and step-children of the applicant, and being from their age and bodily condition unable to earn their own livelihood, are persons legally entitled to parochial relief: Therefore refuses the application as regards Mary Ann Poplar Burgess or Gordon and Joan Gordon; and, with respect to the said Robina Burgess and Thomas Burgess, ordains the Parochial Board of Lerwick and Gulberwick instantly to proceed and determine the question of amount of relief to be afforded to them: Finds no expenses due to or by either party, and decerns.

(Signed) DAVID J. MACKENZIE.

“ *Note.*—This case raises a somewhat peculiar question. There is no doubt that after the well-known decisions referred to in the statement by the respondent, the principle is clear that an able-bodied man is not entitled to parochial relief. The case of *Lindsay v. M'Tear*, 26th March 1852 (24 Jurist, page 391), also extends the principle to the children of an able-bodied applicant. It is not, however, laid down that persons in any less direct relationship should be identified with the applicant. The two children whom I have here admitted are step-children of the applicant. It has been held in the case of *Macdonald v. Macdonald*, 20th June 1846 (8 D. 830), that a step-mother is not liable in aliment to her step-son. While such a claim may be good against a step-father, or against any who, in respect of relationship, may be liable to contribute according to their means, I apprehend that, in the language of a well-known and learned writer on this subject, ‘it is no answer to a claim for relief that the claimant has sons or other relatives who are able, if they choose, to support him,’ and that this is a case in which there is no such identity between the applicant and those for whom he applies as to exclude the claim of the latter.

“ From the answers stated by the applicant, it is evident that those of Robina and Thomas Burgess are really the only cases to which argument

is directed. I do not consider the reference to the Act 40 and 41 Vict. c. 29, relevant in a case of this kind. (Intld.) D J. M."

"*Lerwick, 15th December 1887.*—The Sheriff having considered this appeal and whole proceedings, appoints the appellant to lodge a reclaiming petition within eight days from the date of this interlocutor, and the respondent to lodge answers thereto within eight days thereafter.

(Signed) "GEO. H. THOMS.

"*16th January 1888.*—The Sheriff having resumed consideration of this appeal: Finds that Mary Ann Poplar Burgess or Gordon and the children, Robina Burgess (11 years old) and Joan Gordon (9 months old), are not now requiring parochial relief, but that the child Thomas Burgess (8 years old), being ill and weak, and in need of medical treatment and extra diet, does require, and is entitled to, relief: Ordains the Parochial Board of Lerwick and Gulberwick forthwith to proceed and determine the question of amount of such relief, reserving all claims and rights of recourse or otherwise which the said Board may have: Finds the said Parochial Board liable in the expenses of this application, as the same may be taxed: To the extent of giving effect to these findings, sustains the said appeal, and recalls the interlocutor submitted: And, *quoad ultra*, dismisses the said appeal, and adheres to the said interlocutor, and decerns.

(Signed) GEO. H. THOMS.

"*Note.*—While adhering to the interlocutor appealed against to the extent above mentioned, the Sheriff does not in any way decide the important question which the Sheriff-Substitute should not have allowed to delay the granting of relief here. This, besides, is an inappropriate form in which to raise and determine any such question. While the discussion has proceeded, it may be that the object of parochial relief has been suffering from the want of medical treatment and extra diet. It was the duty of the Parochial Board to have seen that the boy did not so suffer, and to grant him medical treatment and extra diet irrespective of all questions of law. There is nothing in the Inspector's reclaiming petition to suggest a change of circumstances either as regards the father (who must be assumed to be unemployed, as nothing to the contrary appears), or as to the boy, since 10th November 1887, when the certificate (No. 6 of process) that Thomas was ill and weak, and in need of medical treatment, and extra diet was granted. The cases of *Milne (Newhills) v. Henderson (Monquhitter)* and *Smith (Kinellar)*, 3rd December 1879 (7 *Rettie*, 417), and *Graham (Hoddam) v. M'William (Caerlaverock)*, 22nd February 1881 (23 *Poor Law Magazine*, new series, vol. 9, p. 265), illustrate the Sheriff's view of the Inspector's duty,—namely, to give and continue relief on account of the boy since, at least, 10th November 1887, for in these cases as in this the object requiring parochial relief had an able-bodied father, and there were questions of law to be determined. It is to be hoped that the boy here has not suffered from the want of relief.

"Hence it is that, while sustaining the Parochial Board's appeal to some extent, the Sheriff has found the Board liable in the whole expenses of process."

THE JOURNAL OF JURISPRUDENCE.

SOME GENERAL RULES OF THE ART OF LEGAL COMPOSITION.

BY Æ. J. G. MACKAY.

In an address¹ to the Juridical Society of Glasgow, it was shown that the art of legal composition, commonly calling drafting, was capable of and deserved treatment as a whole, and that many common principles are applicable to its three branches, statutory drafting, conveyancing, and pleading. In pursuance of the same subject, it is now proposed to consider the various classes of documents to which the art of legal composition is applicable, and to state some of the general rules by which it is or ought to be regulated.

The variety of these documents is one of the proofs of the wide application and utility of an art which, so far as it has been treated at all, has been treated too much as a matter governed by forms, and too little as subject to principles. The extent of the ground covered by documents which should be composed with reference to the principles of legal composition also shows that, while lawyers are the profession most concerned with its practice, there is scarcely any class in the community which has not sometimes occasions for its use. The general description of the documents to which legal composition applies may be stated as, *All writings expressly intended to be, or which frequently become, the subject of legal interpretation.* By legal interpretation is here meant nothing technical, nothing more and nothing less than the true meaning of such documents. Where technicalities have been allowed to prevent the real meaning from receiving effect, it has been often due to a want of attention to the principles of legal composition. But the use and arrangement of words so as to secure that instant and constant effect shall be given to the intention of parties, are not by any means so easy as is commonly

¹ Printed in the *English Law Quarterly* for 1887. The reader interested in this subject is requested to read this paper as introductory to the present one.

supposed, and to secure this is the object of the rules of legal composition.

The typical and most important class of documents which falls under the first branch of legal composition and statutory drafting are, of course, the laws, enactments, or statutes of a supreme legislative body. The great imperfection of English statutes as compared with the laws of Continental states in modern times, is due not so much to the original drafting, which is very often the work of competent draftsmen, but to the machinery of parliamentary debate, through which their finished work has to pass, and out of which it often comes mangled so as to be unrecognisable by its author, and to become the butt for the satire of cynical judges. Lord Thring's pamphlet on "Practical Legislation, or the Composition and Language of Acts of Parliament," proves the conflict between the ideal statute and the Act, such as the exigencies of parliamentary and party legislation allow it to be. Because Parliament is, as at present constituted, so imperfect a legislative body, it is not necessary to fall into the opposite extreme, and not recognise that parliamentary criticism has in some cases an improving effect upon the draft of a bill. Nor can it be doubted that some form of careful revision and criticism is in most cases desirable for the first drafts or projects of law. Popular criticism is often highly useful. A good law should be capable of being understood by all persons of average intelligence, and the special draftsman is much the better of ascertaining beforehand whether his work is so understood. What is essential for the drafting of good laws is, that the last draft should be in the hands of the original author, with full power to consider all suggestions, and sufficient time to embody them in their proper places in the law before it is promulgated.

Some other documents which fall under this class, and differ from statutes only as regards either their source or the scope of their authority, have this advantage, and are better specimens of legal composition than most modern statutes. Occasionally, also, by a happy accident, a statute like the Bills of Exchange Act of 1882, for which the chief credit is due to Mr. Chalmers, now a county court judge, escapes the process of parliamentary deterioration. The schemes issued by various commissioners for the regulation of schools, charitable endowments, and corporate bodies, are examples of what may be done by careful drafting and attention to the rules of legal composition. Such schemes and provisional orders do not, in fact, differ from laws, except in the mode by which they are made, for after a time and certain preliminaries they receive the effect of law. There is another comprehensive class of documents to which similar rules of composition apply, and which differ from Acts of Parliament in respect that the person or the body which enacts them has not supreme authority, but only authority to a limited extent, and

over a limited class of persons. It receives this authority either by the direct or express consent of the previous bond, or by the delegation to it of some portion of the powers of the Legislature or Executive. Such documents show at once on their face and by their names their legislative or *quasi*-legislative character, and are commonly called acts, laws, bye-laws, statutes. Examples of such are the Acts of the English Convocations or the Scottish General Assemblies, the laws of friendly or industrial and provident societies, the bye-laws of some and the statutes of other corporations or incorporated companies, the regulations or rules of large commercial companies. Although their restricted scope makes such documents of less general importance than the laws of the realm, they are of very great moment to the class of persons bound by them. Their composition should be attended to with equal care to that of laws, and the persons who draw them, most generally the secretaries or other officials of the various churches, corporations, societies, or companies for whose use they are, should be familiar with the rules of legal composition.

The documents falling under the second branch of legal composition, conveyancing, or the drafting of deeds, are still more numerous and varied in their character than those which belong to the first branch of statutory drafting. It embraces all writings by which one or more parties express their meaning on a matter either directly regulating or which may indirectly concern their rights. The wide extent and the diversity of its contents may be seen best by examples. A treaty falls under it. The high contracting parties, as they call themselves, must, just as much as any two ordinary men of business, submit the words in which they embody their agreement to the rules of legal interpretation, and must therefore follow the rules of legal composition. Probably in no case is accurate and clear composition of more vital importance. For there is a serious preliminary difficulty to be overcome as regards most treaties. The parties do not use the same language, and treaties have to be translated into two or more languages, and very frequently into a third, which is the common language of diplomacy, as Persian is in the East, and French was at one time in Europe. Yet this apparent disadvantage may be turned into a gain. For nothing conduces to clearness more than good translation, — the turning of the words expressive of one language into those of another, so that it may be absolutely certain they express the same meaning.

Another reason for requiring treaties to be composed with precision and without ambiguity, is that they have often to be read by persons of all classes in the different nations bound by them, who are not unlikely to be biassed by patriotic or personal interest, and who require to be convinced by the plainest and most incontrovertible language against their bias or interest. For the enforcement of treaties, too, there is often no tribunal other than

the arbitrament of war, which it is desired to avoid, unless it be the public opinion of the world, which cannot be clear and decided if the terms of the treaty are not themselves clear.

Of the ordinary documents of conveyancing, as understood by its professors and practitioners, a marriage-contract and a will are familiar instances. They serve to illustrate the fact that the writings subject to the rules of legal composition may be either the agreement of two or more persons, or the declaration of the will of one. They also show how inapt is the word conveyancing for the art of drafting deeds, as neither of these documents necessarily requires any conveyance or transfer. The contract of marriage may relate wholly to the rights to be subsequently produced by the relations of marriage. A will generally (other than the Scotch form of a disposition and settlement) regards solely the condition of matters that will arise on the death of the maker. Both of these documents are also useful as indications of the necessity for rules of legal composition. There are certainly difficulties and ambiguities in the interpretation of wills due to artificial rules of courts, but still more are due to their defective composition. It is not so easy a matter, even for the professional and trained conveyancer, to provide for numerous contingencies spread over a length of time. But when the drafting of a writing even of the simplest kind, as a short will, is attempted by persons who know nothing of the principles of legal composition, the result is almost certain to be misunderstanding. The litigious lawyer is always grateful to those who make their own wills. As for marriage-contracts, the number of persons who have made their own are probably nearly as rare as that of the Irish parsons who have performed the ceremony of their own marriage; but the frequency of questions on their interpretation, even when drawn, as they now generally are, by good conveyancers, proves that even in the case of specially trained practitioners of the art of legal composition, there is room for improvement.

Another class of documents, falling under the rules of this branch of legal composition, whose importance in practical business is enormous, may be described as the shorthand writings of modern commerce.

Bills, or bought and sold notes, or delivery orders, or business telegrams, are examples of this class.

The special rules of legal composition with regard to them are too technical to be stated in this place. Such forms should never be used unless when absolutely necessary. But as they are absolutely necessary, for the purposes of many kinds of business, this rule is of little practical use. What is essential is that the meaning of such abbreviated forms should itself be fixed by a clear and authoritative code law or agreement, itself readily understood by the parties using them. It is not my purpose at present, however, to enter into any detailed or special rules, but

only to indicate the extent of the subject, by noticing some of the documents falling within the scope of legal composition.

With regard to pleadings, the third branch of the art of legal composition, the documents belonging to it are also of a very miscellaneous character. They include all the writings submitted to a Court in the progress of a cause. Such documents are in this country almost invariably prepared by lawyers. At a time not very long distant, they were the subject of highly technical and artificial rules, observance of which was not necessary for the ends of justice. By a singular paradox, both the observance and neglect of these rules led frequently to the delay and sometimes the defeat of justice. The system in which such technical rules may be seen in its most perfect development was the old English common law pleadings. The merit of strict logical consistency and directness of expression cannot be denied to this system, and make it still worth study; but it was condemned as soon as it became evident that more attention was paid to form than substance, and that a just right might be lost by technical pleas or the neglect of technical rules. The object of the reformed system of pleading now in general use is that every writing produced in Court, from the writ by which a demand is made, to that in which a judgment is expressed, should state as simply and plainly as possible what it means. Still, as daily experience shows, there is an opposite extreme, when pleadings are composed without any attention to form or rules. Such pleadings obscure the questions really at issue between the parties, mislead or take by surprise opponents, and require great care on the part of the judge that he may not be misled and justice sacrificed.

The art of pleading should be simple, and neither artificial nor artful, but it cannot dispense with some plain rules, which in part belong to the general subject of legal composition, and in part are special to itself. While the title of the art of pleading has here been given to it, this, just as much as the art of conveyancing, is a name taken from one only of the class of documents which come within its province. For it includes all the minor and incidental documents prepared in the course of a suit, as well as those generally called the pleadings. And it is also applicable to the opinion of counsel on the faith of which a suit is brought, or the opinion of a judge by which it is concluded.

Having now briefly indicated some of the most important documents which come within the scope of the third branch of legal composition, statutory drafting, conveyancing, and pleading, I propose to state some general rules applicable to all these branches, reserving for the present the special rules, which are necessary from the distinct character and object of each branch.

For some of these rules a few words of explanation and illustration will be necessary, but for the most part they require none.

1. *The art of legal composition is applicable to the following writings or documents:—(1) Laws; under which term are*

included all rules which bind any number of persons, either by their own express consent, or by the direct or delegated authority of the Executive or Legislature: (2) Deeds; under which term are included all writings which express the will of one or more persons relative to their rights or the rights of others: (3) Pleadings; under which term are included all writings used in the course of a suit.

2. *A legal writing or document, the subject of this art, whether a law deed or pleading, is composed of words, sentences, and generally the union of sentences into a larger unit, whether called articles, clauses, paragraphs, sections, or by any like name.*

The latter names are frequently derived from the fact of their being the divisions or subdivisions of some still larger unit, as a chapter, book, law, code, or treaty. But their meaning is that they form a substantive part of the whole composition of greater or less extent.

3. *The art of legal composition is concerned with the choice of words, the order of sentences, and the arrangement of articles, clauses, paragraphs, sections, or by whatever other name the divisions of the whole writing to be composed are called.*
4. *As to the choice of words, words should be preferred which have one meaning only.*

This rule is obviously expedient for the sake of simplicity and to prevent ambiguity. Whenever a word which has two or more meanings is used, there is possible ambiguity and a risk of misunderstanding. But this is a rule which cannot in our own, or, I suppose, in any language be always followed, and it must not be pedantically applied. It would be pedantic to reject the word *shall* because it has both a future and an imperative sense. Frequently, too, the nature of the writing in which the word is used prevents ambiguity. In English we have many equivocal words, which, though spelt identically, have different meanings. Thus *post* may mean (1) an upright piece of wood or other material fixed in the ground, (2) a place occupied by soldiers, (3) an office in which a person is placed, (4) a place where horses are kept for the use of travellers, (5) the house or premises in which letters are placed for the purpose of being conveyed, (6) a public letter carrier. In a statute relating to the post office, it would be pedantic to suppose any of the first four meanings intended, but either the 5th or 6th might be. So its use should be avoided, or confined either to the 5th or 6th meanings, and a separate word used for the others, as (5) *post office*, and (6) *letter carrier*. A recent bill on banking caused great confusion by the use of *issue* in the two distinct senses of authorized issue and secured issue.

5. *The same word should always be used throughout the same writing in one and the same meaning.*

To the preceding rule there may be exceptions, but to this rule there is no exception. A change of meaning must always produce ambiguity. Language is not so poor that it should be ever necessary, or even convenient, to employ the same word to express different things in the same legal composition.

6. *The simplest word, that is the word most commonly understood, should in general be preferred.*

This is a rule of importance, for it is the object of all legal writings that they should be intelligible, that is, commonly understood. Foreign words should therefore not be used. The shreds and tags of Latin or French words, still not uncommon, in legal writings, should disappear. English lawyers and politicians have constantly reproached Scotch for the retention of their antiquated terms derived from the Roman civil law. Scotch lawyers and politicians have retaliated by pointing to the Norman-French and other technical terms in English conveyancing and pleading. Very little has been done by either to correct their own faults in this respect. It is so much easier to see the faults of others. Saxon words should in general be preferred to those of Latin origin. But here also pedantry must be avoided, for some words of Latin derivation are more commonly used and understood than their Saxon equivalents. To this rule there are two exceptions of sufficient importance to be stated as subordinate rules.

7. *Terms of art, that is, words not commonly used or understood, but used and understood by persons in a particular art or business, may be used when the writing is primarily or principally intended for persons engaged in such art or business.*

Thus in a Merchant Shipping Act, words peculiar to shipping may, indeed must, be used; or in a Railway Act, words peculiar to railway business.

8. *Terms of art, and abbreviations the meaning of which is once clearly fixed by definition, may also be used, and ought sometimes to be used for the sake of brevity.*

It frequently happens that the use of a well-chosen and defined term assists in making the meaning clear; and when this is the case, there should be no hesitation in using it, although it is a term of art. Definition, however, is always a peculiarly delicate and difficult part of legal composition. There is risk of the definition overlooking, and so excluding, some case intended to be covered by the term defined. There is the opposite risk of its including cases not intended. In either of these events there is either miscarriage or a long and troublesome discussion as to the true construction of the document which contains the faulty definition. Yet another source of error which may seem unimportant, but is not really so, especially in long documents, is that the definition, by being misplaced in the arrangement of the

document, may be missed or forgotten by the persons who have to consult it.

9. *The briefest words and forms of expression, provided they convey the meaning intended, are to be preferred to longer words and forms of expression.*

This is a rule directed against tautology and circumlocution. How grievously many legal documents, especially some of the older English statutes, and many of the older forms of English and Scottish deeds, neglect this rule, there is no need to point out. In modern drafting there is great improvement, but room for more. I saw lately a clause which expressed no more than that a company might employ agents to invest their funds out of Great Britain, and consumed thirty long lines in verbiage and circumlocution, when two or three would have sufficed. It may almost be said that two words should never be used when one is sufficient to express the meaning. This would be useful if only for saving time in writing and reading. But tautology and circumlocution have graver dangers. Tautology is seldom, as the name appears to imply, really repeating the same thing. It is trying to say the same thing by using a different word, or saying the same thing in different words in order to convey the same meaning to different persons. And there is always risk of error until it is seen which of these things is intended. Circumlocution is saying, or, in the present subject, writing in a roundabout instead of a direct manner. In speech it may be, indeed it generally is, necessary to repeat and expand in order to impress indifferent or unintelligent hearers. But in writing this is rarely necessary. This rule requires, of course, to be understood with the caution of Horace, a master of the art of using words and the fewest words. The writer of a legal composition must not labour to be short, with the result of being obscure. Short words and expressions are only to be used when they are clear.

10. *The word or words should be used which best express the meaning, the whole meaning, and nothing but the meaning.*

This rule is directed against implication and suggestion which may be useful and proper in other forms of composition, but never in legal composition, which should always be explicit and express.

It also strikes against superfluity of words. The maxim, *Superflua non nocent*, is not true in legal composition. But, on the other hand, the most expressive words must be chosen; and if single words do not express the whole meaning, there must be no hesitation in using more.

Although the art of legal composition is distinct from grammar, and implies a knowledge of grammatical rules as a precedent condition, there are one or two rules relating to parts of speech which belong to it, and deserve attention.

11. *Noun substantives, especially the leading substantives in the*

subject-matter to which the writing relates, should be preferred to pronouns, even at the cost of some repetition.

This is a rule directed against the ambiguity arising from the too frequent use of demonstrative and relative pronouns, which, unless carefully selected and placed, leave in doubt to which of several possible antecedents such pronouns relate.

12. *Adjectives should be used as little as possible.*

The reason of this rule is that the meaning of adjectives is less clearly fixed than that of nouns. Every one knows what is meant by a man, but "a good man," or "a prudent man," or "a wise man," have different meanings, according to the estimate of goodness, prudence, wisdom, by different persons.

We may now pass from the rules relating to words, to those relating to sentences.

13. *A sentence in its simplest form, according to the rules of grammar and logic, is composed of a subject, a copula, and a predicate, and it is the same in legal composition.*

14. *In legal composition, the subject, whether expressed by one or more words, is the person or thing about which something is said by the law, deed, or pleading; the predicate is that which is said of the subject; and the copula is the link or auxiliary by which the two are connected so as to form the sentence or proposition.*

15. *The matter of a sentence in legal composition is in general a command, prohibition, or permission in the case of laws; an affirmation, declaration, or obligation in the case of deeds; and a statement or denial of fact, or of a rule of law, in the case of pleadings.*

16. *The sentence in a legal composition should, whenever possible, be simple, that is, it should contain only a single command, prohibition, or permission, a single declaration or obligation in deeds, and a single statement or denial of a fact or legal rule in pleadings.*

But such simplicity is frequently impossible, and a great part of the difficulty of legal composition arises from sentences being either complex or qualified.

17. *A complex sentence is a sentence which states more than one command, prohibition, or permission, or more than one declaration or obligation, or more than one statement or denial of fact or rule of law.*

Such complex sentences can generally be analysed into, and ought, as a rule, to be stated in, two or more sentences. But for the sake of brevity it is sometimes convenient to state more than one of these matters in the same sentence, and this is unobjectionable if the complex sentence is clear.

18. *A qualified sentence is one which does not simply state any single matter, but does so subject to a qualification or condition.*

These qualifications or conditions are of varied kinds and frequent occurrence, and great care requires to be taken with regard to their statement in legal composition. A few of the more general rules with regard to them may be here stated.

19. *The most common qualification or condition is an exception where the general proposition or rule is too wide; but though the statement of exceptions in the same sentence as the proposition or rule is common, it should, if possible, be avoided.*

This sometimes can be done by stating precisely the contents of the general proposition or rule, in which case it becomes unnecessary to state an exception. At other times the exception itself can be stated in a second simple sentence as another or subordinate proposition or rule. Examples of a common class of exceptions in laws or deeds are salvos and provisos, the former of which excepts some general right, as that of the Crown or Church, from the provision of the law or deed, and the latter of which states some provision preliminary to the rule of law or obligation in a deed receiving effect. In both cases the exception can be stated with a little care in a separate simple sentence.

20. *Where conditions require to be stated in the simple sentence itself, they should be placed either before the subject or after the predicate. They should not be inserted in the middle of the sentence.*

This is a rule against parentheses, a besetting sin of some kinds of compositions, and into which persons who speak as well as write are apt to fall.

21. *Where the exception modifies the subject, it should in general be placed before the subject; and where it qualifies the predicate it should be placed after the predicate.*

Lord Thring expresses this rule in his pamphlet on Practical Legislation, when he says that where a law requires the statement of a case before the statutory declaration or proposition with regard to it can be understood, the case should be first stated; for what he means by case is an essential limitation of the subject.

The rules as to sentences may be concluded by a repetition of the rule already stated as to words.

22. *The shortest sentence which fully and clearly expresses the meaning intended, is always to be preferred.*

We may now pass from sentences, of one or more and usually many of which a legal composition is made up, to the subject of the order or arrangement of the whole composition, whether it be a law, deed, or pleading. A few general rules as to this may in conclusion be stated.

23. *The whole is, in the art of legal composition, antecedent to the parts.*

This is a rule of importance in some other kinds of composition occasionally, but of special and invariable importance in legal

composition. The draftsman should always clearly and firmly grasp the whole law, deed, or pleading he is to draw, before he commences to draw any part. This may be done by skilled persons tacitly and almost unconsciously, as mental arithmetic by a skilled calculator, but other persons will do well to lay out a scheme of the whole composition, if it is one of any length, on paper before he begins the draft. The best artist (and drafting has been here considered as an art) seldom paints without preliminary sketches.

Such sketches often suggest omissions which require to be provided for, and if provided for in time prevent that frequent source of difficulty in the construction of laws and deeds the *casus improvisus*. Indeed, in legal composition, the parts will seldom be well drawn unless the whole, and their relation to the whole, is from the first to last kept in view.

This is shown by the nomenclature used with reference to the writings which form its subject. Divisions, parts, sections all presume a whole which is to be divided.

24. *While the whole must be first regarded as antecedent to the parts, the division into parts and the principle of such division should also be at an early stage settled, and constantly kept in view.*

The form of division may vary according to the character and length of the legal composition, but the cases are rare where division is not necessary in a legal composition. When the composition is of any length, it is necessary for the purpose of easy reference. It also gives the person who has to study or explain a document, the relief of a natural pause, such as the reader gets who concludes a chapter of a book. But probably the most important use of division is that each division being in its turn a whole part of the composition, the attention of the composer is or should be specially directed to its management.

The simplest and best mode of expressing divisions is by numbers, and the distinction of Roman and Arabic numerals enables them to be used for the principal and also for subordinate divisions. When still further division is required, the letters of the alphabet become of use. This, like the best names for the division adopted, is matter of detail, and may vary greatly in different compositions.

The present is the proper place to offer a caution against too many and minute subdivisions of the legal composition. Such subdivision, instead of assisting, perplexes the memory, creates difficulties instead of removing them in the matter of reference, and does not in the least help to the understanding of the composition as a whole. Examples of excessive subdivision may be found in many recent statutes. The divisions of a legal composition should reduce it not to atoms, but to visible and tangible parts.

25. *As to the order of the parts of a legal composition, the preamble, preface, or narrative necessarily comes first. The use of this in a law or deed is optional, and it is unnecessary in pleadings.*

Preambles, formerly common, are now generally dispensed with in statutes, or made merely formal. They are really unnecessary. for a law or statute expresses the will of the supreme legislative body, which is not bound to express or explain its reasons for enacting the law, but is entitled to say, "*Sic volo, sic jubeo.*" Being so entitled, the addition of a preamble is a source of error,—or risk of error,—for unless the law be drawn with great precision, the question arises frequently whether the enactments correspond with the preamble.

A preamble or narrative, though in general not necessary, is more useful in a deed, when it records briefly the facts which have led to the deed being made, or sometimes expresses the cause of granting.

It is useful and sometimes necessary in this case, because it shows what reason or motive has operated upon the party or parties to the deed, and led them to enter into it; this may lead to the understanding of its meaning. In most systems of law, too, when an agreement is made in writing, proof is not allowed of any preliminary communings or propositions for the completion of the writing. So that everything parties wish to state in order to express their full meaning must be in the writing itself. There are often facts which require to be so stated, and the narrative or preamble is the proper place for them.

Still, in a deed, if it be well and distinctly composed, narratives or preambles may often be dispensed with. Some of the best and most distinct agreements are short minutes drawn by skilful conveyancers; and their subsequent extension into formal deeds, with all the supposed appropriate paraphernalia of preamble, saving clauses, and the like, frequently obscures their real meaning.

26. *After the preamble should come the clause of definition, if definition is necessary.*

This order is frequently reversed in English statutes, as it was in the *Corpus Juris* of Justinian, when the title *De Verborum Significatione* comes near the end of the Digest. But the Digest is not a good model for legal arrangement, though one of the best models for legal expression. The reason for putting the definition clause at or near the close of an English statute, is admittedly a parliamentary one merely. It allows the bill to pass more easily when criticism is not at once directed to the principal terms employed; and it is also found that the meaning or number of the words to be defined often alters during the discussion of the clauses. So that it is deemed convenient to keep the definition till near the close. But it is sufficiently obvious that the natural order is to explain words which require explanation before and not after

they have been used, and possibly misunderstood. There is an exception to the rule of placing the definition at the commencement of the legal composition. When the thing defined is referred to only in one place or part of the composition, it is sometimes expedient to place the definition near it. This exception is, however, more apparent than real.

27. *After the clause of definition should come as soon as possible the leading enactment of a law or the cardinal provision of a deed.*

This also is a rule sufficiently obvious, but by no means sufficiently attended to. In legal composition the fewer preliminaries the better. The sooner the reader, student, or interpreter of such a composition is put in possession of its main purpose the better. Whatever details, special applications, or qualifications may be necessary, are best left for its subsequent parts.

28. *A legal composition should always remain faithful to its true character and scope, and should never deviate into irrelevant or disconnected subjects.*

The constant breach of this rule has been one of the causes of the chaotic confusion of the English statute book, which has made so many besides the poet wish to burn all the statutes and the shelves. A decided improvement has been made as regards the past statutes by the Statute Law revisions. But the Legislature still goes on in the old bad ways—of combining in one statute slightly connected subject or subjects not connected at all. A flagrant example of this is or was to be found in the Acts nicknamed Omnibus Acts, whose wide name is scarcely wide enough. They treated “de omnibus rebus et quibusdam aliis,” and were intended to slip through at the last moment things forgotten in the parliamentary hurry-scurry, or which it was thought could in this way slip through unobserved. Nor is English legislation an isolated example of this fault. There is nothing more frequent in all classes of legal composition than the introduction of matter which may be good in itself, but is put in the wrong place.

Of course some legal compositions have a very wide scope, and there must be many subjects apparently disconnected which fairly fall within it. The care of the composer, then, must be that each subject should find its proper place, so that its relation to the whole and other parts may be clear. But a much more frequent case is that the sphere of the composition is extended beyond its scope, which ought to be, when once fixed, always adhered to.

If some of these rules are criticised by the experienced legal draftsman as superfluous because generally understood and followed, and others seem too general for practical use, I shall willingly submit to this criticism if the rules stated are not erroneous, and assist the numerous class of persons who are not trained draftsmen, yet have sometimes to draw and constantly to act with reference to legal compositions. I am far from expecting

or wishing the advent of a time when every man will be his own lawyer; but I should be glad if the time were a little nearer than it yet is, when every educated man could understand his own deeds, and be able to know without the aid of an interpreter the meaning of the laws to which he is subject.

Nor am I altogether without the hope that a mature consideration of the principles of Legal Composition may help the training of draftsmen and conveyancers, and produce in the future shorter and clearer laws, deeds, and pleadings.

APPEALS FROM THE SHERIFF COURT UNDER THE JUDICATURE ACT, 6 GEO. IV. CAP. 120.

REMOVAL APPEALS—advocations as they used to be called—from the Sheriff to the superior Court may be taken either *ob contingentiam*, or under the Sheriff Court Act of 1877, the provisions of which, relating to Removal Appeals, have been adopted by the Employers' Liability Act of 1880 to cases under it, or under the Judicature Act of 6 Geo. IV. Removal Appeals *ob contingentiam* enable two cases proceeding in the Sheriff and superior Courts respectively to be conjoined in the latter in circumstances where, if both actions had been raised in the inferior Court, conjoining would have been competent and proper: those under the Sheriff Court Act of 1877 apply only to such actions as the Sheriff's jurisdiction is extended so as to cover by the Act in question; but it has been held, in the case of *Paton v. The Niddrie and Benhar Coal Co.*, January 14th, 1885, reported in 12 R. 538, that a case under the Employers' Liability Act of 1880 may be competently appealed under the Judicature Act, as well as in the manner prescribed by the Sheriff Court Act of 1877, and adopted by the Act of 1880.

The part of the Judicature Act of 6 Geo. IV. cap. 120, which founds the right of advocacy, is contained in section 40, and reads as follows: "In all cases in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts (unless it be an interlocutor allowing a proof to lie *in retentis* or granting diligence for the recovery and production of papers), it shall be competent to either party, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by Bill of Advocation, which shall be passed at once without discussion and without caution." The precise effect of this provision has been judicially determined as regards several of its expressions, and its operation has been regulated by Act of Sederunt.

The case of *Hamilton v. Henderson*, June 10th, 1837, reported in 15 Shaw 1105, negatively defines "proof" by excluding from its

denotation a proof merely *scripto vel juramento*. In the opinions "proof" is explained to mean "proof *prout de jure*," or "proof at large;" indeed, if it were otherwise, every case could have been advocated on production, for instance, of a probative deed to instruct a debt which the defender denied. At the date of this case, however, section 40 of the Judicature Act was not the only ground of appeal open against an interlocutor allowing proof, for under section 36 of the Act 50, Geo. III. cap. 112 (repeatedly cited in the Reports "cap. 121" in error), it was competent to appeal by way of advocacy against the Sheriff's interlocutor on the ground of any "legal objection with respect to the mode of proof;" so that, though appeals against interlocutors allowing proof by writ or oath only were incompetent under 6 Geo. IV., they were competent under 50 Geo. III. This continued to be the law until the passing of the Sheriff Court Act of 1853, the 24th section of which repealed the provisions for advocacy of the Act, 50 Geo. III., and enacted instead, that in cases exceeding the value of £25, all interlocutors by the Sheriff, except such as (1) sist process, or (2) give interim decree for money, or (3) dispose of the whole merits of the case, should be final. This enactment, however, left intact the right of advocacy under the Judicature Act of 6 Geo. IV. (contrary to what a first reading of the Sheriff Court Act of 1853 would lead one to think): this may be clearly inferred from the 73rd and 78th sections of the Court of Session Act of 1868, which, dealing with the right of advocacy under the Judicature Act, as neither excluded nor restricted by any statute then in force, enact that the Bill of Advocacy should be discarded in favour of a Note of Appeal. The result then is to deprive the litigant of the right of appeal against an interlocutor limiting the mode of proof. The meaning of "proof" was further explained in *Tulloch v. Mackintosh*, March 10th, 1838, reported in 16 S. 983, to include a remit to a man of skill, provided that the proof so conducted is of the nature of a proof at large, although such proof may not be the only proof intended to be led. The circumstances were complicated, and the opinions are not expressed without hesitation.

In the case of *Robertson v. Earl of Dudley*, July 13th, 1875, reported in 2 R. 935, the Lord President, in giving judgment, said, that if a party who thought that the Sheriff had limited unduly the proof allowed, had no remedy under the Judicature Act, he was "tied up to go on, and make his reference to oath in the inferior Court; and then when he came here to appeal against the final judgment, he would be too late to raise his objection to the mode of proof with effect. If, therefore, the question arose again in a simple form, we should require to consider whether the case of *Hamilton v. Henderson* was applicable to the altered state of the law." *Hamilton v. Henderson*, however, escaped without further diminution of authority than was implied in the last sentence, for

the Court solved the difficulty presented in the case under discussion by relying on a peculiarity in the circumstances which led to the appeal. The Sheriff had allowed a proof by writ or oath *quoad* part of the cause, and a proof *prout de jure quoad* the rest; and it was held, that since a case may easily consist of different parts, some of which only are fitted to go before a jury, an appeal was competent *quoad* the part on which proof *prout de jure* had been allowed. So far this was in support of *Hamilton v. Henderson*; but the Court proceeded to hold, that though the appeal was competent only *quoad* part of the cause, still, once a part of the case was appealed, the rest necessarily followed it, and it was thus "within the competency of this Court to dispose of the whole points in the case; and amongst others, before sending part of the case to a jury, to decide whether the Sheriff was right in his limitation of proof as regards the rest." In a previous case, *Stewart v. Rutherford* (*infra*), an appeal had been sustained, although the proof allowed was only of part of the averments. This case, therefore, establishes an important modification on the strict construction of the word "proof," as used in the 40th section of the Judicature Act, promulgated in *Hamilton v. Henderson*, viz. that the "proof," while it must be a "proof *prout de jure*," or "at large," need neither be the only kind of proof allowed, nor relate to the whole case, and may thus virtually entitle to an appeal against an interlocutor limiting the mode of proof *quoad* part of the case.

In the case just discussed (*Robertson v. Earl of Dudley*), the party who appealed was the party to whom proof, by writ or oath of his opponent, had been allowed; conversely, in a previous case, *Shirra v. Robertson*, June 7, 1873, reported in 11 M.P. 660, the appeal was taken by the party to whose writ or oath reference was to be made under the interlocutor allowing the limited proof to his opponent. In this case also the appeal was refused as incompetent. Shirra had raised the action for payment of £100 on promissory note, and the Sheriff-Substitute had held, with reference to Robertson's statements in defence, that they did not contain any sufficiently specific averment of payment or extinction of the debt, such as it would be competent to refer to the pursuer's oath. The Sheriff, on appeal, recalled, and allowed the defender a proof before answer of these averments by the pursuer's writ or oath; and the pursuer appealed to the Court of Session against this interlocutor. In the older case of *Stewart v. Rutherford*, July 19, 1862, reported in 24 D. 1442, it had been held no objection to an appeal of this kind that the proof allowed was before answer; and although in the present case it was urged that the result of refusing the appeal would be practically to deprive the pursuer of possible benefit from any objection he might have taken at the relevance of the defender's averments, the Court held, that since the Sheriff's interlocutor neither sisted process, nor

gave interim decree for the payment of money, nor disposed of the whole merits of the cause, there was no appeal under the Sheriff Court Act of 1853, and the authority of *Hamilton v. Henderson* was considered decisive against the right of appeal under section 40 of the Judicature Act.

A case just decided in the Court of Session, *Wilson v. Brackenridge*, presents circumstances similar to those in *Robertson v. Earl of Dudley*, in respect that the appeal was taken by the party to whom the limited proof had been allowed, but differing from them in respect that no proof at large had been allowed at the same time. There was thus no chance for the appellant in this case of getting the benefit of such a side-wind as enabled the appellant in *Robertson v. Earl of Dudley* practically to succeed in bringing the interlocutor allowing a limited proof under review. The appeal was refused, but the Court seemed impressed by the hardship on the appellant, and though they did not recur to the hint thrown out in *Robertson v. Earl of Dudley*,—as to the possible modification of the principle of *Hamilton v. Henderson*, rendered necessary by the repeal of 50 George III. cap. 112 (*supra*),—they suggested that one plan in such circumstances would be for the appellant to refuse to refer to his opponent's oath, allow decree to go against him in the Sheriff Court, and then appeal against the Sheriff's interlocutor, as disposing of the whole merits of the case; and thus bring under review, by the Court of Session, all the interlocutors pronounced, including that which allowed the limited proof. The case, however, does not absolutely complete the chain of authority, inasmuch as the appeal was incompetent on another ground, viz. that it had been taken after a longer interval from the date of the interlocutor appealed against than is allowed in the case of appeals under the Judicature Act. This limitation in respect of time was not expressly enacted by 6 Geo. IV. cap. 120, the words of which are: "As soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts . . . it shall be competent to either party . . . to remove the process into the Court of Session," etc. It was introduced by section 71 of the Act of Sederunt of 12th November 1825, repealed and re-enacted by section 5 of the Act of Sederunt of 11th July 1828, which provides, that if "neither party, within fifteen days . . . after the date of such interlocutor allowing a proof, should intimate in the inferior Court the passing of a Bill of Advocation, such proof may immediately thereafter effectually proceed in the inferior Court, unless reasonable evidence shall be produced to the inferior judge that a Bill of Advocation has been presented, or the judge be satisfied that effectual measures have been taken for presenting it; in which case the inferior judge shall prorogate the time for taking the proof for a reasonable time, not less than seven days after that fixed for the first diet of proof . . . and if within" that period "no intimation shall be made of any such Bill of Advocation, the

proof shall then proceed ; and the Bill, if such have been presented, together with the passing thereof, shall be held to fall as if such Bill had never been presented." In applying this provision to modern practice, the Note of Appeal of the 73rd section of the Court of Session Act of 1868 must be substituted for the Bill of Advocation. The result is to construe the words of the Judicature Act ("as soon as") to mean "*within 15 days*." This limitation was questioned in two cases¹ on the ground that the Act of Sederunt of 1825 was *ultra vires* of the Court, but without effect. The earlier of these cases, *Graham v. Duke of Montrose*, establishes that where a proof is allowed by one interlocutor, and a commission for examining witnesses is granted by another and subsequent interlocutor, the fifteen days count from the date of the first interlocutor which allowed the proof ; but, in order to secure that the parties should have time for an advocacy, it is specially provided by the Act of Sederunt of 10th July 1839, section 126, that "it shall not be competent to either of the parties to take any proof, except one to lie *in retentis*, until after the expiry" of the fifteen days ; and, accordingly, the Sheriff's interlocutor always fixes the diet at least fifteen days after its date. The *terminus a quo* was further defined in the recent case of *Kinnes v. Fleming*, January 15, 1881, reported in 8 R. 386. The Sheriff had allowed a proof on 2nd September, and assigned the 23rd September for the diet. The diet was discharged, and a new one was fixed on three successive occasions thereafter, the last interlocutor being dated 15th December, and fixing the diet for the 20th of the same month. Were the fifteen days to count from the 2nd September, in which case the appeal was clearly incompetent, or from the 15th December, in which case the appeal was taken within the prescribed limit, and the Sheriff had fixed the diet too early ? This question turns upon the answer to another : Was the interlocutor of 15th December assigning a new diet an "interlocutor allowing proof" ?—in which case the fifteen days would count from its date ; or was it one merely adjourning a proof previously allowed, in which case the currency of the fifteen days would be entirely independent of the date on which it was pronounced ? The distinction between an interlocutor anew allowing a proof, and one adjourning the date of a proof already allowed, is discussed in the previous case of *Murphy v. McKeand*, February 15, 1866, reported in 4 M.P. 444. That case related to the competency of an appeal from the Sheriff-Substitute to the Sheriff under section 19 of the Sheriff Court Act of 1853, but its authority was recognised as applicable to the case of an appeal to the Court of Session under the Judicature Act, inasmuch as the words "interlocutor allowing a proof" are common to both statutes. The petitioner, to whom the Sheriff-Substitute had

¹ *Graham v. Duke of Montrose*, November 24, 1826, 5 S. 38 ; *Falconer v. Shiels & Co.*, July 10, 1827, 5 S. 919.

allowed a proof, failed to appear at the diet fixed, and the Sheriff-Substitute "renewed the diet for the petitioner's leading proof under the interlocutor of 2nd inst." (i.e. the interlocutor first allowing the proof). The Court of Session held that this was "an interlocutor reviving allowance of proof," and was therefore to be considered as "the same as one allowing a proof." This proceeded partly on the ground that under the 10th section of the Sheriff Court Act of 1853 the petitioner's failure to appear at the diet first fixed discharged his right to a proof under the first interlocutor, and left no allowance of proof to renew. But in the case of *Kinnes v. Fleming*, the party who had caused the delay, and had applied for adjournment, was not the pursuer to whom the proof was allowed, but the defender, who was also the appellant; and the Sheriff's interlocutor simply "assigned as a new diet of proof Monday, the 20th day of December." In these circumstances the Court of Session held that at the date of the Sheriff's interlocutor appealed against it was still the right of the pursuer to have a proof; and that the assignment of a new diet was "a matter of course," which was neither "an allowance of proof" nor "a renewal of an allowance of proof," and accordingly dismissed the appeal as not timeously presented. On the other hand, where the Sheriff-Substitute's interlocutor allowing a proof and assigning a diet is appealed to the Sheriff, who simply adheres without fixing a new diet, the fifteen days count from the date of the Sheriff's interlocutor adhering, not from that of the Substitute first allowing proof (*per* Lord President in *Duff v. Stewart*, *infra*).

Some difficulty has been caused by cases in which the amount of the claim is not clearly above £40. The provision of the Act of Sederunt of 1828 on this point is as follows:—"If the . . . claim shall not be simply pecuniary, so that it cannot appear on the face of the Bill that it is above £40 in amount, the party intending to advocate shall previously apply by petition to the judge in the inferior Court for leave to that effect, . . . and the petitioner shall be bound, if required by the judge, to give his solemn declaration that the claim is of the true value of £40 and upwards, and on such petition being presented, and on such declaration if required being made to the satisfaction of the judge, leave shall be granted to advocate," etc. In these cases which do not appear *ex facie* of greater value than £40, the proof may competently be taken on any day within fifteen days from the date of the interlocutor allowing a proof; the provisions of the Act of Sederunt of 1839 (*supra*) do not apply to them, and the party who wishes to advocate must secure himself by presenting the petition for leave, and declaring the value of the cause to be £40 and upwards, immediately on the interlocutor allowing a proof being pronounced. This rule has been stringently applied. In the case of *Ritchie v. Ritchie*, October 22, 1870, reported in

8 S.L.R. 13, the diet was in the first instance fixed by the Sheriff-Substitute for the *ninth* day after the allowance of proof, but was on the *tenth* day, after an unsuccessful appeal to the Sheriff, adjourned to the *fifteenth* day, when the defender not having appeared, the pursuer led his proof before the Sheriff-Substitute, and circumduction of the proof went out. Meanwhile, on the *thirteenth* day after the first allowance of proof, the defender had presented a petition for leave to the Sheriff, declaring the value of the cause to be £40 and upwards; but on advising (after the date of the proof and circumduction thereof), the Sheriff dismissed the petition on the ground that proof had already been taken. Against this interlocutor the defender appealed to the Court of Session; but since the value of the cause was not *ex facie* above £40, the Sheriff-Substitute had competently fixed the first diet within the limit of fifteen days; and since, on the tenth day, no petition for leave had been intimated, and there was nothing "to satisfy the judge that effectual measures had been taken for presenting" a Note of Appeal, he competently fixed the new diet for a date less than seven days after the first one. In this way, although the defender presented his petition for leave to the Sheriff before the date of the second diet, he had effectually cut himself off from the benefit of the 5th section of the Act of Sederunt of 1828; and his appeal was dismissed accordingly. A more difficult case was that of *Duff v. Stewart*, October 20, 1881, reported in 9 R. 17. On the *fifteenth* day after the date of the Sheriff's interlocutor allowing a proof, the defender lodged a petition for leave, and declared that the value of the cause was £40 and upwards, and after the lapse of one month—a delay due partly to the Sheriff's expectation that the parties were to submit to arbitration—leave was granted. The First Division of the Court of Session held that the appeal was incompetent, and that the lodging of the petition for appeal within the fifteen days was not an "effectual measure" in the sense of the Act of Sederunt of 1828, although the Sheriff's interlocutor allowing a proof did not fix any diet. The Court was no doubt largely influenced by the desire to prevent delays of an indefinite kind while a power of appeal as to procedure is available, and it is worth noting that Lord Deas, while he did not dissent, indicated an opinion that "the terms of the Act of Sederunt are not sufficiently explicit to exclude such review and render the appeal incompetent;" but the case makes it clear that the only safe course is to petition for leave at once, and get the appeal presented to the Court of Session and intimated to the Sheriff within fifteen days from the date of the interlocutor allowing a proof. Against the interlocutor of the Sheriff granting or refusing leave there is no appeal (see opinions in *Rain v. Gibb*, 19th May 1877, 4 R. 732).

PROTECTION OF INFANTS.

WE would here use the term "infant" in the natural and Scotch legal sense, and not as applicable to young people who are well enough able to look after themselves, whatever designation English law may choose to apply to them. Amongst the various subjects which have in recent times attracted the attention and called forth the enthusiasm of humane persons, has been that of the treatment of young children by their own parents. There can be no doubt as to the fact that a large proportion of the misery which is caused by poverty and crime does fall to the share of the infants. Every attempt to diminish the evil, and rescue the innocent sufferers, is beset with difficulty; and philanthropists, perhaps in an especial degree female philanthropists, are disposed to consider that the law places obstacles in their way, and unduly protects brutal parents in their course of cruel conduct. Of course the legal difficulty arises from the conflict between a perfectly sound theory (a theory the soundness of which is admitted by everybody) and the facts of human life. The one holds, and rightly holds, that every parent is the natural and proper guardian of his own children: it being always recognised, however, that as their guardian he owes certain duties to the community. Not only is the parent the natural guardian, he will be, in the majority of cases, the guardian who has the deepest and most kindly interest in the child—this interest is not so likely to fluctuate as that of others. The philanthropist may rescue a child from poverty and cruelty one day, and forget him the next. On the other hand, the world abounds in cruel and worthless parents (who are not, as legal decisions prove, confined to any one class), while of recent years associations have been formed, in whose charge neglected children may safely be left. Philanthropists who devote themselves to the interests of young and helpless children argue in this way. They say that, as a matter of fact, it is legal to starve and leave unclothed a child, and even to subject it to cruel usage; while it is illegal for the benevolent to carry it off from its parents, and secure for it food, comfort, and the prospect of advancement in life. Now there is a certain measure of truth in all this. Strictly speaking, a parent may not starve and ill use his child, but in the majority of cases the law allows him opportunities of doing so at intervals. A man may be imprisoned for such cruelty, and repeatedly go to prison for his unnatural conduct, but in the periods which occur between his convictions, the child suffers all the same. Moreover legal proof sufficient to warrant a conviction is extremely difficult to obtain, and a great deal of cruelty may, in such cases, be legally inflicted. While this is so, the philanthropist who carries away the little victim is always exposed to the risk of a litigation, at the instance of the worthless

parent, who, if he has no friends of his own, may easily obtain the services of one of those lawyers who follow in the footsteps of Dodson & Fogg. Whether or not the child's friend could prevail in such an action upon mere proof of the benefit derived by the child, without at the same time evidence that, at some time or other, the parent consented to, or at least acquiesced in, the removal of his offspring, is doubtful.

But there have been two recent decisions which ought to encourage philanthropists, and lead them to think more kindly of the judges in the Court of Session. The first of these is *Sutherland v. Taylor*, which was briefly noticed in last month's issue. In that case, which came before the First Division, and was decided in December last, the pursuer was the mother of an illegitimate child—a delicate infant, suffering for the sins of its parents. When two months old this child had been handed over by the pursuer to the defender, who had undertaken to adopt or provide for it permanently. After the child had remained with its guardian for over a year, the mother, a woman in destitute circumstances, presented a petition to the Court for delivery of her child. It was not disputed that she had been a party to the agreement under which her child had been taken from her, but it was contended that such an arrangement could only subsist at the will of the parent. The argument raised obviously a question of great practical importance affecting this branch of philanthropic work. It is obvious that if the contention is sound, their efforts to rescue children, whether made by individuals acting alone or combined in association, must, in a great measure, be rendered useless. There must be some security for the hold over the child. Such security is of course given in the case of children of a certain age under the Industrial School Acts, when the warrant issued covers a period of years, and can only be interfered with by the Secretary of State upon good cause shown. But how did the Court deal with this plea?

The Lord President, who gave the judgment, quite admitted that Sutherland had a *prima facie* case. "No one," he said, "can doubt that the petitioner possesses the only legal title to the custody of her child. The putative father has no right over it at all. The child is very young, and therefore, in addition to her legal title to its custody, the petitioner is also the natural custodian of a child at such an early age. But," he goes on to add, "as regards the question of custody there are other considerations to be taken into account besides the legal title, and the Court has always considered as of importance the interests of the child itself and its position as regards the possibilities of life, health, and support." After reviewing the circumstances of this particular case, and pointing out the delicate health of the child and the poverty of the mother, he wound up in these terms:—"I think we have enough before us to conclude that if the child were delivered to

the petitioner she could not provide the generous diet, warm clothing, and careful nursing which are here said to be essential, and therefore it follows that to deliver the child to the petitioner would be to imperil not only its comfort, but its health and its life. In these circumstances I think we have here a case to overcome the legal title of the petitioner, for it is apparent that the highest interests of the child—its health and life—would be endangered by such a course, and I am therefore for refusing this petition."

It will be observed that in this case there was no allegation of cruelty made against the parent, and the Court fully recognised her right to come and say that the agreement entered into by her could not bind her in the event of her choosing to change her mind. But they would not overlook the manifest interests of the child.

In the more recent case of *Mackay v. Colston and Others*, not yet finally decided, the First Division have again adopted a precisely similar view. They have recognised the interest of the child as paramount, and not to be prejudiced by a legal theory of a parent's rights. In this case a father had committed his child to a society instituted for the purpose of protecting young children and maintaining a Home for them in Edinburgh. One of the members, Miss Stirling, a benevolent lady, having purchased a farm in Nova Scotia, took the child to Canada. The father petitioned for its restoration to this country, and was opposed by the directors of the society, who maintained that owing to his habits and poverty he was unable properly to support his child. The Court have ordered the Sheriff to inquire into the whole circumstances of the case, and to report the result of such inquiry for their benefit before finally disposing of the petition.

There are of course a number of older cases, some indeed of quite venerable antiquity, in which the Court interfered to protect children whose interests were likely to suffer. But usually these were the children of important families, whose relatives were in a position to demand interference. It is significant, perhaps, of the old association between the Church and the Law Courts, that in the earlier instances we find the erroneous theological beliefs of the parent was held sufficient to warrant judicial intervention. A man may now teach his children what he pleases—or, like the father of John Stuart Mill, refuse to give them a religious teaching at all. But formerly it was not so. Amongst the cases quoted by Lord Fraser is that of *Scott of Raeburn*, whose children were taken from him because he and his wife were "infected with the error of Quakerism," while the young Marquis of Huntly was committed to the tender care of Archbishop Sharp, in order that he might escape the snares of Popery. In *Baillie v. Agnew* (5 Sup. 526), however, the cruelty of the father, due to his drinking habits, was the ground upon which the Court refused to recognise

his parental rights, and Lord Fraser considers cruelty a clear ground for interference. The time has surely now arrived, when the Legislature might lend some assistance to the philanthropic efforts which are being made on behalf of children. A parent convicted of neglect or cruelty ought not to be allowed, after payment of a fine or a short period of imprisonment, to resume his or her cruel conduct. The efforts of such men as Dr. Barnardo, of London, are well worthy of State recognition. A child might easily be reclaimed at a small expense to the ratepayers, who will have to pay heavily for his maintenance if he is left to the charge of his natural guardians.

OWNERSHIP IN LAND—AN HISTORICAL SKETCH.

BY PROFESSOR BLUNTSCHLI.

1. *Barbarians and Nomads.*—Ownership in land was developed much more slowly than ownership in moveables; and its history has been far richer and its development more varied. The history of ownership in land is to a great extent the history of civilisation. So long as the dwellings of men continued to be rude, insecure, and easily changed, and so long as the soil was used only in passing, the thought of ownership in land could not arise. Barbarian races have never of themselves attained to ownership in land. In the present day we find that the wild hunters in Australia, who, like the fox, take possession of a hole in the earth as their resting place, know nothing of ownership in land. The same holds true of the Indians in the primeval forests of Brazil, who hang their mats between the trees, as the birds do with their nests; or who plait cabins out of foliage, like beehives. The idea of ownership in land is not even reached by the higher civilised nomadic tribes, because their sites are not permanent. Where the dwelling is only a tent, which is, as it were, but a further mantle flung round the body, it constitutes a moveable like the garment. It is only when the dwelling rests immoveably in the soil that it takes on the nature of the soil; and that the settled feeling of *house* and *home*, arising in the man, can take root in it.

2. *Theocratic Ideas of the East—The Jews.*—Man could not appropriate the soil with the same ease as a moveable, nor could he at once exercise power over the land wherever he happened to stay. The soil existed there before him, and it survived his life. It did not follow the individual on his journeys, nor could it be carried with him. It could not even be transformed or destroyed at will. A great part of the Oriental peoples regarded the soil in its internal natural connection as the earth, saying: "The earth is God's, and man has only a temporary enjoyment of it; God is

the true owner, man is only the user of it." Every one is familiar with this view from the Mosaic law (Lev. xxv. 23): "The land shall not be sold for ever: for the land is Mine; for ye are strangers and sojourners with Me."

It was only in *houses* in the cities that a sort of special ownership was recognised; for the house in its structure and arrangement was undoubtedly the proper work of man, and not of universal nature. Hence it was that the individual was able to assert a real ownership in it (Lev. xxv. 30). This is the view of the theocracy applied to the cultivation of the soil. Its logical consequence does not let the feeling of freedom arise among the possessors of the land, nor even a feeling of security. God gives and takes according to His will. Human nature did, indeed, occasionally react against the doctrine of the priests. When the same fields had been cultivated and used for a long time by the descendants of one race, there came gradually a feeling over the family, or over the individual usufructuaries, that these fields belong to them, and that it would be unjust were they taken from them again. It is very doubtful whether the agrarian legislation of the Mosaic law, which prescribed the restoration of the divided lands in the Jubilee year, was ever practically carried out; it is certain that it did not continue to be permanently practicable. The contradiction between religion and the feeling of right thus arising, could not come to a reconciliation, nor could ownership on such a basis attain a development.

3. *Mohammedanism*.—The view of Islam with regard to ownership in land was very closely related with the older theocratic view of the Jews, being, like it, *Semitic*. God does not give goods in land immediately to individual possessors, but mediately through the mediation of His *representative* upon earth, the Ruler of the Faithful. To him God gives the whole land in order that he may apply it to religious foundations, or divide it into pieces, and then bestow these pieces, either as fixed military fiefs or as mere tribute land. God is the Supreme Owner; the Sultan is His representative; the settled human right in the soil is only a dependent feudal right. This order proceeds from above in stages down to the lower classes of the population. Along with the rich foundations, there come first the great feudal territories of the leaders in various classes, and then the lesser military fiefs (*timar*) of the *Sipahis*. According to the principle of right, it is only the believers who are favoured with fiefs. In the last resort, the feudatories or vassals cultivate the soil which is vouchsafed to them—as of grace—for hereditary labour and heavily burdened enjoyment. According to Mohammedan law, the possession of the whole of the land continues in this manner to be connected together. The whole Empire is an inwardly united system of domains, foundations, fiefs, and farms. But as regards the individual, there is nowhere any right security of existence, and a rude arbitrariness

everywhere stops the path of free development. It is true that the Representative of God is, indeed, a man to whom the precepts of morality and the laws of the Koran must be sacred, and who therefore administers his office according to justice, and not by mere mysterious inspirations; and he is one who can be addressed in a human way. But if this is no longer the complete theocracy, it is still at least a half theocracy. The belief in the divine vicegerency of the Sultan is fitted to puff up the Ruler of Faithful with excessive self-consciousness, and to intensify his passions beyond all limit; and, on the other hand, it is also fitted to determine the subjects to slavish subjection. It is upon this ground that the despotic will of the over-lord grows up, and it soon oppresses or eats through the whole system. The capriciousness of the supreme landlord then becomes imitated by the intermediate feudal lords, and by the lower feudatories in opposition to the classes standing below them; and it thus sinks still farther down to the commonest and rudest of the people. This Osmanic feudal system is thus much ruder than the mediæval Germanic system.

4. *India*.—In Asia, however, there already appear along with the theocratizing view of the possession of the land, the germs of a more self-conscious human system. These germs attain a certain development in India, but they again perish, probably from the time of the Mongolian supremacy; in China, however, they are carefully cherished and become fruitful. The old *Hindu* law-books (*Manu* and *Yajnavalkya*) recognise the distinction between the collective ownership of the community and the special ownership of the individuals. They put ownership in moveables and in land in the same class, and thus ascribe to man full rights in both, and even admit a prescription or usucaption in land when the owner silently lets the cultivator continue in possession for twenty years, as happens in the case of moveables in ten years (*Manu* viii. 147, and *Yajnav.* ii. 24). The difference between possession and ownership has thus likewise become manifest; and the former, when consecrated by time, may become strengthened into the latter. This reminds us entirely of the European real right, and more closely of real rights in the Roman law. But the ancient Indian system of right, which we do not now know exactly in detail, has perished for centuries. The Mohammedan conquerors appropriated all the land to themselves as a divine grant, which was then further granted in great part to a number of territorial princes and tax-gatherers, and then let by these to smaller peasants for cultivation and tax-paying. In the present day there is still a very great part of the soil of India which is regarded as the property of the English Crown, and which is granted to hereditary feudatories (*Adamanom*) with heavy ground burdens; and these are often again subdivided in different grades. The special possessors have the fixed hereditary

maintenance of their dominion imperfectly secured by law. This derived inheritance is throughout burdened with heavy ground imposts, which are sometimes even subject to increase; and important voices are raised demanding the gradual reacquisition by the State of the ownership in land.

5. *China*.—It has not been ascertained whence the Chinese derived their ideas of ownership; but it is now established as a fact, that among all the Asiatic peoples, they have possessed for a long time the most developed system of land-possession, and that it is an entirely rational human system. The Chinese have the reputation of being the most careful small agriculturists in the world. Their system of possession, and this eminent characteristic of their cultivation, certainly stand in an inner relation with each other. Forestry and management of pasturage still recall the old wild life of the hunters and nomads, which did not lead to fixed ownership in land. On the other hand, where man applies his personal industry to the cultivation of the soil, where he frequently turns up the soil, and regularly sows and manures it and cuts its fruits, he becomes conscious of a close personal connection with the cultivated fields; and he begins to think "this field is mine." But where the cultivation of properties approaches the conditions of horticulture, as appears to be very generally the case in China, this special feeling becomes still more lively. The Chinese cultivation pre-eminently follows the considerations of purpose and utility. The Chinese are not moved by great ideas, nor are they agitated by powerful passions. They keep to what is closest at hand, exercise carefulness and dexterity, and seek to draw as much fruit and enjoyment as is possible from the smallest objects. Without scientific spirit, they yet diligently gather and diffuse the experiences of their own history, and know how to turn prudently to account their learned and technical knowledge. A deeper knowledge of the conception of ownership has not risen amongst them even to-day. In theory the old Oriental idea is still maintained in China, that the whole of the land belongs by right to the Emperor, the Son of Heaven; and that the peasants and cultivators only derive their rights from him as leaseholders or farmers. In practice, however, the Chinese have completely set aside the feudalistic limitation and dependence, which was formerly effective among them, for the security and credit of peasant possessorship by the introduction of land-books, in which all sales and mortgages must be entered; and, just as in modern Europe, these records are admirably looked after. The numerous class of small landlords have secured to them the liberty of cultivating, alienating, and dividing their properties, under the one exception of not leaving the land uncultivated, or letting it grow wild from being unused, as this would be to the common detriment.

6. *Land-ownership in Europe*.—In Europe the theocratic ideas

soon began to fade. Only occasionally do we hear some echoes of the Oriental view of the dominion of God over the land; as, in the Middle Ages, in the doctrine of the spirituality of tithes, which were demanded as a recognition of the supreme Divine ownership. The Christian spiritualities were thus related to the Mosaic law, which otherwise had long since been antiquated, and was never practicable for Europe. The common element in the European view of right in regard to possession of the land is, that men everywhere trust themselves to appropriate the soil as a right of their own, and to assert *independent human dominion* over it. The possession of the land is thus secured in principle from the tutelage and rapacity of the priests, as it was from the arbitrary absolutism of the Sultans; and scope is procured for the development of human labour.

But otherwise the fundamental views of the several European peoples greatly diverge, and within the same people the various systems often come into conflict and alternate in their supremacy. In particular, there is one opposition which goes all through the history of European civilisation, and which appears only in different forms at different times and among different peoples. When men assert dominion over the soil, they may do it in combination as a *collective* body, and they may exercise this dominion in common; or they may appropriate the several parts of the soil exclusively as *individuals*, and every one may control his separate property by himself. This double relation of the control by the whole community, and by the individuals, shows itself in various forms. We may designate it as the opposition between *collective ownership* and *separate ownership*, these two expressions being taken, however, in a wide sense. It is not merely the historical events, but also the character of the particular land, that has an influence upon this distinction. The more rigid the exclusion, the more private the use of the soil, and the more individual the cultivation and care applied to it, so much the more will its parts pass into separate possession; and hence also they will become adapted for separate ownership. The more open the sections of the land, the more similar and simple their cultivation, the more rude and wild the surface of the earth becomes, so much the more readily does it gravitate towards the common control of the community. Advancing from what is most individual to what is most general, such stages as the following may be distinguished:—(1) Dwelling-house, stabling, sheds, enclosed courtyard; (2) Hedged garden; (3) Conjoined fields and meadows, "Infang;" (4) Open fields scattered in the plains; (5) Open meadow and forest; (6) Brooks and rivers; (7) Inhospitable tracts, moors, bare mountain; (8) Lakes; (9) the Sea. In the beginning of the series the dominion easily concentrates itself into individual separate ownership; towards the end it gets expanded into collective ownership. At last the idea of ownership loses all applicability. In the

middle, between the extremes, there meet, in mixture and in conflict, the two kinds of dominion.

(a) *The Roman System.*—The Romans were the first among all the European peoples to develop the idea of separate ownership in parts of the land; and they did it more energetically, but also more roughly and more one-sidedly, than any others. Their theory of right passed to their successors, and is still an essential element in the modern systems of law. The Romans also originally recognised the opposition referred to it. The houses in the cities were from the outset the exclusive property of the individual citizens; but the arable land was still for the most part the public land of the people (*ager publicus*), and the parts of it were only entrusted to the old citizens in possession (*possessionses*). In later times the ancient lordship of the community in the soil was still repeated in a wider compass. The provincial soil was held to be the property of the Roman people, or of the Emperor, and was consequently *owned by the State*; and the provincials had only a derivative possession in their properties. Among the Romans, however, even in the first period of the kings, there was another part of the arable soil which was divided under full individual ownership (*dominium*) among the citizens; and these assigned estates were entirely separated from the original connection with the common land. This introduced an entirely new stage in the development of land-ownership. All those ideas of absolute and exclusive control by the individual, which were connected with ownership in moveable things, were now also transferred to ownership in portions of the land. The same word *dominium* was equally referred to both things, and the natural distinctions between them were not further considered. At first the forms of the acquisition of ownership were for a time differently determined. In the acquisition of land, certain public forms were prescribed regulating the transfer of ownership (*mancipatio, in jure cessio*). But later even these forms went out of use,—just as their early rigidity had been softened by the institution of usucaption; and as in commerce with common moveables, the mere delivery of possession came to be regarded as also sufficient in the case of property in lands. Discretionary use, freedom to alienate and to divide estates in land, came to be the natural effects of this private ownership, which always extended more widely over the Italian soil and the soil of the provinces under Italian law. The idea having become thus matured, was then extended without scruple to the State properties. The treasury (*ærarium*) of the Roman people, or the fiscus of the Roman Emperor, was regarded as a private person; and an absolute and exclusive separate ownership was ascribed to it, just as to the individual citizens in their separate estates. Where the nature of the surface of the earth would not adapt itself to this individual control,—as in the public waters,—the Roman jurists preferred to regard these things as being found

in no one's ownership (*res nullius*). The idea of the *collective* and *common* dominion thus came to be completely suppressed and expelled from their jurisprudence. It was only in the conception of the *res publicæ* that a last echo of it remained.

The effects of this Roman doctrine of ownership were, in the earlier times, extremely favourable to the common weal; but in later times they helped to hasten on the destruction of the Empire, and to make that destruction inevitable. A multitude of fathers of plebeian families had acquired property in land through numerous assignments; and it was by this means that they first attained a strong feeling of independence and freedom. And even when they had still no share, or but a scanty participation, in political rights vouchsafed to them, they were nevertheless unlimited masters on their own ground and soil. Their private right was now completely secured, and it was as extensive as possible. They cultivated their moderate properties, according to their own free discretion, with their household. In this class of free landlords the State also found a firm foundation for its proud structure; and out of it its fresh powers were continually drawn. The strength of its army, its wealth, and its courage rested for the most part on this foundation. It was only when commerce and luxury had gathered excessive riches, and collected along with them a base and restless proletariat population in Rome, that the increasing misrelations began to affect this sounder basis of the State. From time to time patriotic statesman still attempted to cure the evil by new divisions of land, and thus to consolidate again, in an agricultural form, a part of the poorer population of the city. These attempts, however, were seldom capable of being entirely realized, and they only retarded the downfall a little. The monied aristocracy of the city obtained more and more the possession of the smaller estates, by buying out and suppressing their owners; and they joined them together into great domains. The large number of peasant proprietors, which had formed the marrow of the people, continually diminished in an extremely questionable way; and this fresh source of the popular strength gradually dried up. Upon the immense domains of the *grande*s there arose princely palaces with all the luxury of the earth; but these domains were now partly cultivated by slaves, under the supervision of managers, without any rights of their own, and partly—and in later times mostly—by colonists astricted to the soil with heavily burdened rights, and in a morally lowered position, and sometimes exceptionally by mere lease-holders. With the decay of the flourishing freedom of the landholders, the cultivation of the soil likewise decayed as a whole. The *Compagna* around Rome had formerly supported a large and prosperous population, but it had now sunk into an uncultivated pasturage for sheep and goats.

It would be foolish to ascribe this corruption exclusively, or

even pre-eminently, to the Roman conception of ownership; but it did not only not hinder that corruption, much rather did it further it. The view it implied held no regard either to the family, or to the community, or to the State. All right was attributed in this relation without limitation to the individual who was recognised as master of the estate. Nothing turned upon such facts as whether the owner cultivated his estate or not, or whether he lived upon it or not. The most exclusive and arbitrary selfishness formed the spirit of the Roman land-ownership; and it found no limit anywhere, except in the uncomprehended and unsubduable power of nature. Is it to be wondered at that the strongest and richest of these egoists at last swallowed up the weaker and less wealthy among them, as the sharks devour the smaller fishes? Even when the need of the State had become very sensibly felt even in the imperial coffers, and when the taxability of the land was threatened with extinction, they did not venture to limit the arbitrariness of the ownership in the person of the landlords, who were living in the city far from the estates; but recourse was had rather to the expedient of binding the service of the small farmers to the soil, and compelling them by legal coercive measures to cultivate it. The absolute real dominion of the few large owners over their domains, was regarded as inviolable; but the personal liberty of the mass of the small cultivators was sacrificed to the need of cultivating the land. To such crying contradictions did the development of the Roman law lead.

(To be continued.)

Reviews.

A Manual of Conveyancing, in the Form of Question and Answer.

By the late JOHN HENDRY, W.S. Fourth Edition. Revised by JOHN PHILIP WOOD, W.S. Edinburgh: Bell & Bradfute.

THE fact that a new edition of this manual is now required, shows the estimation in which the work is held, not merely by students, for whose benefit it is professedly written, but also by practising members of the legal profession. Only seven years have elapsed since the last edition was brought out by Mr. Wood, the editor of the present edition. The groundwork of the manual is still the notes and memoranda, in an arranged and extended form, made by the late Mr. John Hendry, W.S., while he was a student in the Conveyancing Class of Edinburgh University. In the second edition, which was brought out by Mr. John T. Mowbray, W.S., the text of those notes and memoranda was reverently preserved,

the editor's emendations and additions having been made in separate footnotes. Mr. Wood, in the third edition, and also in the present edition, has treated his two predecessors with equal reverence, distinguishing by square brackets the new matter which he has ventured to insert in the text. The result is a work of mosaic art. Take, for example, Question 1072, which is as follows:—"By a delivered deed A disposed to himself, whom failing to B, whom failing to A's heirs-male. On the death of A (B having predeceased him) his heir-male expedite service as nearest and lawful heir-male in general of A, and took infeftment on the deed. Was his title valid? State the reason." Mr. Hendry's answer is: "No; because the service ought to have been as heir-male of provision; a service as heir-male simply not proving that B had failed." Mr. Mowbray's note is: "The object of a service is not to prove facts, but to take a right, though for this purpose it is necessary to prove certain facts. The service here should have been as heir of provision, because it was only under the special deed that the heir had right to the succession." Then follows Mr. Wood's answer, in square brackets: "This answer will now be to the opposite effect, as the Conveyancing Act, 1874, sec. 11, says that it is to be no objection to a service that the character of the heir is wrongly stated therein. See, however, doubt expressed by Mr. Mowbray in his analysis of the Act, p. 18, on the point in this question." This *Coke-upon-Littleton* style of editing possesses the merit of modesty, but also the demerit of causing mental paralysis in ordinary readers; and it seems peculiarly unsuitable so unpretentious a work as a Shorter Catechism of Conveyancing.

Apart from this defect, Mr. Wood's work has been carefully and accurately done, although exception may be taken to a few of the 1227 answers to the 1227 conveyancing conundrums of which the book consists. Thus in Answer 732 it is stated, that where no holding is expressed in a conveyance, an alternative holding is implied, whereas section 4 of the Conveyancing Act has rendered such a holding impossible. The book, however, appears to us to be a sufficiently trustworthy guide through the mighty maze which modern legislation has made of our system of conveyancing.

Manual of the Education Acts for Scotland. By ALEXANDER CRAIG SELLAR, M.P., Advocate. Eighth Edition. Revised and in great part re-written by J. EDWARD GRAHAM, B.A., Advocate. Wm. Blackwood & Sons. 1888.

THIS is an admirable edition of an admirable book. The last edition appeared in 1879; but, as since then there has been a considerable amount of legislation bearing upon education in Scotland, it was quite time that a new one was published. Mr. Graham has done his work very carefully and well: he has not given a mere nominal supervision to the work while passing

through the press, but has docked it here and amplified it there, so as to make it a still more useful book than it was before. The first part consists of a summary of the principal Acts dealing with education in Scotland up to the present time, the general effect of their provisions being succinctly stated. The second part is chiefly taken up with the text of the Education Act of 1872. Copious and useful notes are given after each section, and the repealed portions of the Act are printed in italics, so that the reader sees at a glance what provisions are at present in force and what are obsolete. The other Education Acts which have passed are next given, finishing up with the Technical Schools Act of last session, the provisions of which the editor confesses are not easy to reconcile; his notes on it, however, are suggestive and practical. Not the least useful feature of this book is the collection of cases which have been decided in the Courts of law, or opinions of counsel which have been given regarding matters relative to the carrying out of the Education Acts. A variety of questions have arisen from time to time on such subjects as elections, supply of school accommodation, finance, prosecutions, the rights and duties of teachers, etc. About two hundred cases are given, the whole forming a very useful digest of the subject. An appendix is added, giving, either in full or in an abbreviated form, every Act bearing on education in Scotland. The more important statutes, such as the Educational Endowments Act of 1882 and the Industrial Schools Act of 1866, are given at length. A carefully compiled index makes the contents of the volume readily accessible.

From the above indication of the arrangement and plan of this book, an idea of its practical usefulness may be got. It appears at a very opportune time, and we have no doubt it will have a large sale among the members of the new School Boards which are being elected. They certainly could not desire a better guide to the intricacies of the Education Acts.

Inaugural Address delivered before the Scots Law Society at the opening of Session 1887-88, by SIR HORACE DAVY, Q.C.
Printed by Permission. Edinburgh: T. & T. Clark.

SIR HORACE DAVY'S valuable address on the laws relating to the transfer of land in Scotland and England has been published in separate form. It contains an interesting account of the differences in the laws of the two countries, and the learned author bears ample testimony to the many excellences which the Scottish law possesses. The lecture is written with care and discrimination, and is worth the perusal of every conveyancer.

The Month.

VACATION ARRANGEMENTS.

THE Lords appoint THURSDAY, the 5th April, and WEDNESDAY, the 25th April, to be the Box-Days in the Spring Vacation.

The LORD ORDINARY ON THE BILLS will sit in Court on WEDNESDAY, the 11th April, and TUESDAY, the 1st May, each day at eleven o'clock, for the disposal of motions and other business falling under the 93rd section of the Court of Session Act, 1868; and Rolls will be taken up on MONDAY, the 9th April, and SATURDAY, 28th April, between the hours of eleven and twelve o'clock.

SPRING CIRCUITS, 1888.

South.

The Lord MONCREIFF, Lord JUSTICE-CLERK, and Lord ADAM

Ayr—Tuesday, 3rd April, at half-past ten o'clock.

Dumfries—Thursday, 5th April, at half-past ten o'clock.

Jedburgh—Tuesday, 10th April, at half-past ten o'clock.

D. M'KECHNIE, Esq., Advocate-Depute.

J. M. M'COSH, Clerk.

West.

Lords YOUNG and CRAIGHILL.

Inveraray—Thursday, 29th March.

Stirling—Saturday, 31st March, at eleven o'clock.

Glasgow—Wednesday, 9th May, at half-past ten o'clock.

JAMES WALLACE, Esq., Advocate-Depute.

ÆNEAS MACBEAN, Clerk.

North.

Lords MURE and M'LAREN.

Inverness—Thursday, 12th April, at half-past ten o'clock.

Perth—Tuesday, 17th April, at half-past ten o'clock.

Dundee—Tuesday, 1st May, at half-past ten o'clock.

Aberdeen—Thursday, 3rd May, at half-past ten o'clock.

JOHN RANKINE, Esq., Advocate-Depute.

HORACE SKEETE, Clerk.

NOTES FROM LONDON.

THE decision of Mr. Justice Stirling in the Bethell marriage case has occasioned a good deal of adverse criticism, even in legal papers and magazines. See *Law Notes* for the month. It is said that Lord Penzance, in *Hyde v. Hyde* (1 P. and D. 1867), did not deal with the *rights of succession* of the issue of a polygamous union, from which the element of polygamy was merely accidentally absent. Again, even if marriage is "the union of a man and a woman who promise to go through life with each other alone," is not the fact that the two parties *do in fact* remain absolutely faithful to each other sufficient evidence of their *intention* to do so?

* * *

A ARRIVES at Paddington Station forty minutes before the departure of her train, and gives her Gladstone bag into the custody of a porter, who loses it. Is the railway company liable? The question was answered in the affirmative by the County Court judge of Marylebone, in the negative by the Queen's Bench Division, and again in the affirmative by the Court of Appeal, and now by the House of Lords—Lord Bramwell dissenting. The *ratio decidendi*, however, was narrow. It was held that the company had implicitly undertaken responsibility by accepting through its servants the luggage of the passengers, and by issuing tickets for the plaintiff's train at the time when the loss occurred (*Bunch and Wife v. Great Western Railway Co.*).

* * *

IN *Walter v. Walter*—a suit for the dissolution of marriage decided recently in the Divorce Court—the defence set up was the insanity of the respondent at the time of the commission of the alleged offence. "The rules in *MacNaughten's case*" were brought forward once again to settle the question, when Mr. Justice Butt darkly observed that with regard to these rules he had an opinion which he would not express. If the learned judge has been correctly reported, the heresy of Mr. Justice Stephen would appear to be prevailing.

* * *

TWO ships come into collision. One sinks, and a *passenger* is drowned. There was negligence on the part of the *crew* of each vessel. Until a few weeks ago the representatives of the passenger could not have brought an action against the owners of the vessel directly causing the accident, on the principle laid down in *Thorogood v. Bryan* in 1849, that the deceased, by having voluntarily

become a passenger in the one vessel, was "identified" with, and responsible for, the negligence of its crew.

This "doctrine of identification" has now been repudiated by the House of Lords (*Mills v. Armstrong*).

* * *

IN *The Missouri Steamship Co.*, Mr. Justice Chitty, following Mr. Justice Willes in *Lloyd v. Guibert* (33 L. J. Q. B. 241), held that the interpretation of a contract of affreightment is, in the absence of express stipulation, governed by "the law of the flag."

THE fact that a summons has been signeted does not render it too late to use arrestments for the purpose of founding jurisdiction. *Per* the Lord President: "The question is, When is it necessary that the Court should have jurisdiction over a defender personally in order to make the judgment effectual? Certainly it is not necessary till the action begins, and it has recently been decided that an action begins when the summons is served; and therefore on that ground it is enough to say that jurisdiction has been founded in good time if it is founded before the summons is served" (*Wall's Trustees v. Drynan and Others*, Feb. 1, 1888).

* * *

WE note two cases relating to the arrestment of wages and alimentary funds, a subject affecting a large if humble class of the community. In *Dick v. Russel*, Dec. 24, 1887 (First Division), a colliery labourer earned a precarious income of 12s. per week. In addition he had an alimentary allowance amounting to the same sum. The funds affording it were arrested in the hands of trustees. The Court recalled the arrestments, on the ground that the whole weekly income of 24s. was required for the support of the petitioner. In *M'Minchy v. Emslie and Guthrie*, Feb. 4, 1888, a lamp-lighter received, during the winter months, £2, 4s. per week, but out of that sum he had to pay assistants, and there was left for himself a balance of 19s. per week. His case was held to fall under the Wages Arrestment Act. He was considered a workman within the meaning of that Act, and not a contractor, in spite of the fact that he employed assistants.

* * *

THE case of *Cruickshank v. Gow & Sons*, Jan. 25, 1888 (Second Division), ought to prove a warning to parties in the habit of receiving small debt summonses. Mr. Cruickshank received one in which his middle name, "Vincent," was omitted, and Cruick-

shank transformed into Cruchshanks. But he did not defend nor reple against the decree in absence. When it came to a poiding of his effects, however, he had recourse to the more expensive process of an action of interdict, only to find that he had moved too late; for the Sheriff-Substitute, Sheriff, and, finally, the Court of Session, would not listen to him. *Per* Lord Rutherford Clark: "A person in the pursuer's position must know if a summons is intended for him; and if the objection to it is a good one, he is bound to appear and state it. If not, the decree which is pronounced against him, notwithstanding the error, will avail against him."

* * *

THE case of *Niven v. Renton*, disposed of by the Justiciary Court on February 10th, affords a comment upon the expression "person duly authorized" which occurs in the Ground Game Act of 1880. In this case the tenant of a certain farm in Fife gave written permission to a friend for one day's shooting. The friend availing himself of the permission, was prosecuted for poaching, and convicted. He appealed, and contended that the limitations imposed by the statute did not apply to killing with firearms, that he might be said to be a member of the tenant's household while shooting on his lands, and that he had acted with the leave of the occupier and in good faith. But the respondent's counsel was not called upon. "Better," said Lord Craighill, "repeal the clause at once, or deal with it as blotted out of the Act, than force from the words of the clause that for which the appellant's counsel so earnestly contended."

* * *

IN a criminal prosecution it is competent to found upon the admissions in the evidence of the accused given in a previous civil action. Thus, in a prosecution for sending a threatening letter, the evidence seems to have mainly consisted of the prisoner's declaration and an admission made by him in an action previously raised in connection with this letter. While determining the question of the competency, the Court refused to deal with that of the sufficiency of the evidence. They held themselves bound to believe that the inferior judge had satisfied himself as to the sufficiency of what was laid before the jury. The Lord Justice-Clerk pointed out that there might be more difficulty as to whether what has been said by an accused person in a former criminal action can be proved as evidence against him in a subsequent criminal prosecution" (*Banaghan v. H.M. Advocate*, Feb. 10th, 1888, H. C.).

* * *

NOTWITHSTANDING the Lord Advocate's endeavours to sweep away all ground for technical objections to indictments, ingenious counsel are still to be found pursuing the old course. In *Beuglass v. Blair*, Feb. 10th, 1888, H. C., an indictment which stated that the accused did "form part of a disorderly crowd of persons, and behave in a disorderly manner, and annoy and disturb the lieges, and commit a breach of the peace," was objected to as not setting forth circumstances sufficient to constitute an indictable offence. The objection was repelled. *Per* the Lord Justice-Clerk (who did not think the indictment a model of consecutive and logical sequence): "Our ideas of relevancy have been somewhat altered by recent legislation, and we certainly cannot abide by the strict rules that were in vogue with regard to indictments before the passing of the late Act."

* *

A VERDICT of "misappropriation" won't do in a trial for embezzlement, or rather it will only serve for the purpose of acquittal (*Macmillan v. H.M. Advocate*, Feb. 10th, 1888, H. C.).

* *

Report of the Committee of the Faculty of Advocates on the Criminal Evidence Bill, 1888.—The object of the proposed "Criminal Evidence Act, 1888," is to render persons accused of a crime or offence (and the wives or husbands of such persons) competent but not compellable witnesses at their own trial. A Committee of Faculty reported unanimously last year in favour of a similar Bill, and they suggested a new clause, with a view to render the Bill applicable to Scotland. Their Report was unanimously approved of by the Faculty on 18th March 1887.—

Having compared the present Bill with that of last year, and carefully considered the new clause above referred to, the present Committee unanimously approve of the present Bill, subject to the following amendments:—

Clause 2 provides a form of caution to be addressed by the Court to the accused, when undefended, and not already called as a witness; but the Committee think that he should also be expressly cautioned when undefended, and when called as a witness by the prosecutor. For, in that event, the Bill, as at present framed, provides no security that he shall be duly warned as to the possible consequences. The Committee therefore suggest that clause 2 should run thus:—

"2. When a person charged with an offence is not defended by counsel or solicitor, and—

"(1) Is called as a witness by the prosecutor, the Court or the justice before whom he is charged shall inform him that he is not

obliged to appear as a witness, but that, if he does, his evidence may be used against him;

“(2) Has not been called as a witness by the prosecutor, then, on the completion of the evidence for the prosecution, such Court or such Justice shall inform him that he is at liberty to tender himself as a witness in answer to the charge, but that his evidence may be used against him.”

In order to render the Bill more perfectly applicable to Scotland, the Committee are of opinion that a clause should be added, after clause 2, to the following effect:—

“3. In Scotland, where the prosecutor intends to call the person charged, or the wife or husband of such person, as a witness, he shall include the name or names of such person or persons in the list of witnesses for the prosecution; but it shall not be necessary for the person charged to include such name or names in the list of witnesses for the defence.”

J. KIRKPATRICK, *Convener*.

At a meeting of the Faculty of Advocates this Report was considered and adopted, subject to the following alteration:—Instead of a new clause 3, as at end of Report, add as a fourth proviso to section 1 of the Bill, “4. In Scotland, in cases in which, according to existing practice, lists of the witnesses are required, neither the prosecutor nor the person charged shall be entitled to call the latter's husband or wife, unless his or her name appear either in the list of witnesses for the prosecution, or in the list for the defence.”

* * *

Report of the Committee of the Faculty of Advocates on a Bill to Enlarge the Powers of Limited Owners of Land in Scotland.—This is a revised edition of a Bill prepared and brought in by Mr. Haldane, and three other members of the House of Commons, last session of Parliament. That Bill was remitted by the House of Commons, without discussion, to a Select Committee, who went over the Bill and revised its clauses. No further progress was made with that Bill. It is understood that effect is given in the present Bill to the revision so made, except as regards Part XV., relating to the proportional adjustment of burdens, that part having been struck out by the Select Committee, without any expression of opinion as to its policy, on the ground that it required more consideration and separate treatment.

An explanatory memorandum prefixed to the present Bill states that the object of the Bill is “to get rid of certain evils attending the limited ownership of land in Scotland, of which limited ownership the chief illustrations are afforded by heirs of entail and life-renters; that the Bill attempts to introduce what are conceived to be certain changes necessary as a preliminary to effecting a

wider distribution of the ownership of land in Scotland ; and that the general aim throughout has been, as far as possible, to get rid of dual ownership (*sic*) and to establish something approaching to freedom in dealing with land."

Your Committee quite approve of the general object of the Bill, although they cannot but think that these objects have been already attained by existing legislation to a far greater extent than the framers of the Bill suppose. But your Committee regret that they cannot approve of the Bill itself. In their opinion the Bill, if passed into law, would occasion evils greater than those which it seeks to remove.

The distinguishing characteristic of the Bill is that it comes in a foreign garb. It seeks to impose on Scottish jurisprudence English statutes, English procedure, and English rules of law. Hitherto Parliament has treated our system of land rights with respect, reforming it from time to time in such a manner as seemed necessary or expedient, but always recognising it as a national and rational system. The present Bill recognises the existing system only by abolishing it and repealing almost all the legislative reforms of the last one hundred and twenty years, in order to clear the way for the introduction of a new system.

The new system thus sought to be introduced is the English system of Settled Estates, as amended by recent legislation, culminating in the Settled Land Acts of 1882, 1884, and 1887. The present Bill (which consists of 102 clauses) is mainly an attempt to apply those Acts to Scotland; and your Committee are bound to say that, viewed in that light, its clauses (with the exception of clause 100) are skilfully drafted, and intelligible to legal experts. But your Committee are of opinion that the inherent difficulties and disadvantages of the attempt to graft an alien system on our law of land rights have not been overcome, and cannot be overcome, by the framers of the Bill.

The Bill contains a number of provisions on matters not dealt with by the English Settled Land Acts; and your Committee approve of several of these provisions as after mentioned.

Your Committee will now proceed to give a summary of the provisions of the Bill, and to indicate their opinion on each of them. It should be noted at the outset that the Bill applies to house property as well as to land, and apparently to every other kind of heritable estate.

1. Future entails are to be prohibited.

The Faculty of Advocates have already declared themselves favourable to this proposal. In view, however, of the large powers already possessed by heirs of entail, and the still larger powers proposed to be conferred upon them, it is a matter of comparatively little importance whether entails should be abolished in name as well as in practical effect.

2. Future liferents of heritable property are to be prohibited, except in the case of the husband, wife, son, or daughter of the person creating the liferent.

This seems an unnecessary and vexatious restriction, having no counterpart in the law of England. By the existing law of Scotland, a liferent, whether of land or of personal property, cannot be constituted in favour of an unborn person. This seems a sufficient restriction, and your Committee see no reason for imposing a further restriction in the case of land or house property. At present it is very common for a purchaser, especially in the case of urban subjects, to take a conveyance to himself in liferent and to his children in fee. This would, without reason, be prohibited by the Bill.

3. The Bill slumps together four classes of "limited owners" (whom it designates "liferenters"), viz. heirs of entail in possession, liferenters in actual possession, persons who through trustees are entitled to the annual produce of heritable property, and pupil absolute proprietors (section 93); and gives the same powers to all, with some slight qualifications, *e.g.* that pupils must act through their tutors. This attempt to ignore the distinction between these different classes of owners appears to your Committee to be fraught with difficulty as regards titles to land, and injustice as regards the rights of parties.

4. "Liferenters," in the enlarged sense of the term above mentioned, are to be entitled to sell, feu, excamb, lease, charge with improvement expenditure, etc. In some cases these powers can be exercised only after certain notices, but in no case is it necessary to make application to any Court. All the provisions of the numerous Entail Acts of the last one hundred and twenty years with reference to these powers are repealed, in order to introduce the English procedure with reference to the exercise of such powers by "tenants for life" under the Settled Land Acts.

As regards heirs of entail, much larger powers of administration than at present exist may, your Committee think, be safely conferred on them, so as to place them (in the words of the Memorandum prefixed to the Bill) as nearly as possible, so far as regards the public, in the position of absolute owners. But when it is proposed to sell or to borrow on the security of the estate, the interests of substitute heirs of entail require to be protected and preserved. Experience has shown that this can be most satisfactorily done by applications to the Court; and your Committee believe that nothing else would satisfy intending purchasers or lenders. What the Bill proposes is, that notices to trustees and others shall take the place of judicial procedure, and that, when there are no trustees, trustees shall be appointed by the Court. Such a system may work well in England, where the objects aimed at by entails are accomplished by means of settlements

generally protected by trustees, and where titles to land do not require to be registered. But your Committee are convinced that such a novel system would not work well in Scotland.

As regards liferenters, the proposal to place them in the same position as heirs of entail is quite novel, and requires serious consideration. By the law of Scotland heirs of entail in possession are owners in the true sense of the word, while liferenters are not. The Bill, however, proposes in effect to convert every liferenter of heritable property into an owner, subject to this condition, that he must act prudently, under pain of personal liability to the fiars; and with this qualification, that if he exercises the power of sale, the price must be invested so as to keep the capital intact for the ultimate benefit of the fiar. Your Committee are of opinion that while liferenters may be safely entrusted with the same powers of administration as heirs of entail, they ought not to have power of sale. There would be as much justice in allowing fiars to pay off liferenters as in allowing liferenters to sell without the consent of fiars.

Your Committee specially object to the power of sale being given, as the Bill proposes, to persons who, under future trusts, may be entitled to the income arising from heritable property. If this becomes law, no person will be able to give the income of such property to his widow during her life or till she marries again, and the fee to his children, without running the risk of his widow selling the property. This seems an interference with the right of bequest not justified by public policy. On the other hand, if the liferenter assigns his or her right, the assignee is not to be entitled to exercise the powers conferred by the Bill on liferenters, so that land may in this way be kept out of the market, contrary to the policy of the Bill. Your Committee are of opinion that the utmost that is required by public policy is, that there shall at all times be some person in the position of absolute owner, in so far as regards the public. In the case of land held under trust, this would be sufficiently attained by providing that the trustees in whom the land is invested should be in that position. Your Committee therefore recommend, as a preferable provision, that in all cases trustees should have conferred upon them by law full powers of sale.

This may be sufficiently provided for in two ways,—1st, By repealing that part of the third section of the Trusts (Scotland) Act, 1867, which debars dealing with the trust estate in any way inconsistent with the intention of the trust; and 2nd, Extending the proviso in that section so as to meet the case of any beneficiary being under incapacity, by providing that consent may be given by his guardian or curator *ad litem*. The effect of this alteration would be, first, to enable a liferenter under the trust to call upon the trustees not merely to sell, but also to grant feus or long leases, to excamb, and to borrow money on the security of the

trust estate. If the trustees consent, and the other consents are obtained, the authority of the Court would not be required. If, on the other hand, the consent of all beneficiaries cannot be obtained, the authority of the Court would be required.

5. Power is given to the Court to free entailed or liferented land from burdens by transferring such burdens to Government securities, with a ten per centum margin.

This seems a reasonable provision.

6. Provisions for dealing with land for public and scientific purposes.

These are very nearly the same as exist under the present Entail Acts.

7. The proportional adjustment of burdens. A discretionary power is given to the Court of Session to reduce burdens on land of the nature of family provisions or for charitable purposes, where the land on which they are secured has become reduced in annual value owing to general causes.

The majority of your Committee approve of this proposal. The question is, no doubt, a new and important one, affecting all parts of the United Kingdom, as stated by the Select Committee of last year. But the safeguards provided by the Bill are most ample, and the majority of your Committee are convinced that the Court of Session would not exercise the discretionary power conferred upon them, except in cases where it was clear that the intention of testators was being defeated by the recent great and unprecedented fall in the annual value of land in Scotland.

On the whole, then, your Committee disapprove of the present Bill, though they think that several of its provisions might with advantage to the public be passed into law. What is required is a Bill on Scottish lines, reforming and consolidating, but not abolishing, the law of land rights with reference to heirs of entail, liferenters, and trustees holding land.

J. HENDERSON BEGG, *Convener*.

The following amendments by Professor Rankine, Mr. Alison, and Mr. J. Ferguson were proposed, but were not adopted:—

“Approve of the Report, subject to the qualification that the Faculty consider that liferenters should have the same powers of sale as are at present possessed by heirs of entail: that is to say, powers of sale subject to the sanction of the Court, and re-investment of the price.”

“Disapprove of section 7 of the Report and part XV. of the Bill, relating to the proportional adjustment of burdens, being of opinion that the proposal, which is directed against an alleged grievance not peculiar to Scotland, is so novel and far-reaching in principle, and of so doubtful expediency, that it ought not to be dealt with unless by a separate Bill applicable to the whole kingdom.”

"Should only approve of the proposal of the Bill subject to the proposed powers being confined to cases in which legislation had already directly affected the sources of income on which the burdens are charged."

* * *

Report by Committee of the Faculty of Advocates on Railway and Canal Traffic Bill, 1888.—In a note prefixed to this Bill it is stated, "This Bill is identical with the Bill which passed through the House of Lords last session, except that the conciliation clause (clause 28), which was struck out in that House, has been restored." The Committee appointed by the Faculty last year reported upon the Bill, not as passed, but as *presented* to the House of Lords last session; and although the present Bill is framed on the same lines, it contains at least one important alteration upon the Bill so reported on, which the Committee think it right to point out to the Faculty. Otherwise they refer to the Report of last year as embodying their views regarding the general provisions of the Bill—which Report was approved of by the Faculty on 13th May 1887.—

The principal objects of the Bill, as set forth in the memorandum annexed thereto, are to reconstitute and perpetuate the Railway and Canal Commission established by the Regulation of Railways Act, 1873, to enlarge its jurisdiction and powers, and to regulate the rates to be charged for traffic on railways and canals.

The present Bill is confined to the subject of goods traffic, and does not touch the question of passenger traffic or public safety. It is divided into four parts. The first part relates to the constitution, procedure, and jurisdiction of the Railway and Canal Commission; the second part contains provisions concerning traffic charges; the third part relates to canals; and the fourth part contains miscellaneous provisions.

The second part refers exclusively to matters which the Committee think, as stated in their Report of last year, do not properly fall within their province to consider. These matters may safely be left to the parties chiefly interested therein, viz. the railway companies and their shareholders on the one hand, and the traders on the other. But the first part of the Bill, establishing a new Court of Railway Commissioners, is of a different character, and deals with a matter which the Committee think is well worthy of the consideration of the Faculty.

Section 2 of the Railway and Canal Traffic Act of 1854 contains the well-known enactment that every railway company shall afford all reasonable facilities for the receiving and forwarding and delivery of traffic, and that "no such company shall make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or company, or any particular description of traffic, in any respect whatsoever;" and the remedy

prescribed by that Act (section 3) for any company or person complaining of its contravention is to apply in a summary way by motion or summons in Scotland to the Court of Session.

The jurisdiction of the Court of Session regarding such matters was transferred to the Railway Commissioners by the Regulation of Railways Act, 1873; and the present Bill proposes to transfer that jurisdiction to the proposed Commission, and to extend it to other questions relating to the conducting of their traffic by railway companies. The Bill as presented to the House of Lords last year proposed to create a new Commission, consisting of three permanent appointed and three *ex officio* Commissioners. One of the three appointed Commissioners was to be styled the Chief Commissioner, and to be of experience in the law, appointed on the recommendation of the Lord Chancellor. Of the three *ex officio* Commissioners, one was to be nominated for England, one for Scotland, and one for Ireland, was to be one of the Judges of the Supreme Court of his country, and was not to be required to attend out of the part of the United Kingdom for which he was nominated.

The important alteration in the present Bill consists in the constitution of the proposed Court. In the memorandum prefaced to the Bill it is stated thus: "The Bill proposes to abolish the existing Railway Commission and to establish a new Commission, to sit in England, or, if cases require it, Scotland or Ireland. The Commission is to consist of two permanent appointed Commissioners, and three *ex officio* Commissioners. The appointed Commissioners are to be appointed on the recommendation of the Board of Trade, and one of them is to be experienced in railway business. Of the three *ex officio* members one is to be appointed for England, one for Scotland, and one for Ireland, and the *ex officio* Commissioner for each part of the United Kingdom is to be one of the judges of the Superior Court of that part. *The ex officio Commissioner for the part of the United Kingdom in which the case is being heard is to attend and preside.*" This new proposal meets with the unanimous approval of the Committee; and provided sufficient precautions are taken for the Court so constituted sitting in Scotland for the disposal of Scotch cases as afterwards suggested, they recommend it for the approval of the Faculty.

It may be mentioned that by section 4 of the Bill it is provided that the *ex officio* Commissioner for Scotland shall be such judge of the superior Court as the Lord President of the Court of Session may from time to time, by writing under his hand, assign, and such assignment shall be made for a period of not less than five years; and the Lord President, in communication with such *ex officio* Commissioner, is to make regulations as to the arrangements for securing attendance and the times and place of sitting in each case.

But although the exclusive jurisdiction of the Commission is thus rendered less objectionable by the provisions of the present Bill, the Committee are of opinion that it will still be objectionable to many traders unacquainted with this new Court, which in Scotland must still be looked upon as in some degree a foreign one, and which in all likelihood will prove to be an expensive one to litigants; and the Committee recommend that the jurisdiction of the Bill Chamber and the Court of Session, which existed prior to the Act of 1873, with regard to all questions arising between Scotch railway companies and their traders, should be restored—leaving it to the option of the complainer to apply for his remedy in either Court.

Section 5 empowers the Commission to hold sittings in any part of the United Kingdom, in such place or places as may be most convenient to them. This permissive clause is adopted almost verbatim from the Regulation of Railways Act, 1873, and it is worthy of note that the Commissioners under that Act have never yet availed themselves of that permission. It is provided that the central office of the Commissioners shall be in London, and an additional judge is to be appointed in England—obviously contemplating that, in the main, the Commissioners are to be an English Court, usually, if not always, sitting in London.

As stated in their Report of last year, the Committee are of opinion that if an Act on the lines of the present Bill is passed, it should contain a provision enjoining the Commissioners to sit in Scotland while hearing and disposing of questions between two or more Scotch railway companies, or actions or complaints to which a Scotch railway company are respondents, or actions at the instance of a railway company in which a domiciled Scotchman is defender, unless both parties concur in asking the Commissioners to try the case elsewhere; and that the expenses of the Commissioners sitting in Scotland should be provided in the same way as their expenses while sitting in London, and that no part thereof should be chargeable against the parties.

Section 12 entitles the Commissioners, in any matter in which they have jurisdiction, to award, in addition to any other relief, damages to the aggrieved party. The Committee think that the attention of railway companies and traders should be drawn to this section, which excludes them from their common law right of having damages assessed for or against them in a Court of law by a jury.

Section 15, having reference to the transfer of rating appeals from a Court of Quarter-Sessions or Special Sessions, has no application to Scotland, Quarter-Sessions in Scotland having no jurisdiction to determine questions of rating. The clause should therefore, if intended to apply to Scotland, be made more explicit; but the Committee think that the present system of rating—meaning thereby the valuation of railways in Scotland—is

preferable to that proposed, and therefore that this clause should contain an express declaration that it does not apply to Scotland.

Section 17 deals with the question of appeals, and sub-section (2) provides as follows:—"Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior Court of Appeal." The Committee recommend that after the words "to a superior Court of Appeal" the words should be added, "in the country in which the Commissioners sit and try the case."

In conclusion, the Committee are of opinion that the Bill, especially if amended as suggested in the above Report, is deserving of the favourable consideration of the Faculty as undoubtedly effecting a beneficial change of the present law and procedure regarding railway and canal traffic.

ROBERT JOHNSTONE, *Convener*.

At a meeting of the Faculty this Report was considered and adopted, subject to the following alteration and addition,—p. 5, second last line,—in place of "in which the Commissioners sit and try the case," substitute "in which the case arises;" and after the word Bill in bottom line, add "as far as considered by the Committee."

* * *

Report of the Committee of the Faculty of Advocates on the Small Debt (Scotland) Bill.—On 13th July last, a Committee, composed of the greater number of the members of the present Committee, returned a Report upon the Small Debt (Scotland) Bill of 1887. On 15th July the Faculty remitted to that Committee, with the addition of two other members, "to report on the summary jurisdiction of the Sheriff in civil cases." That Committee returned a Report on 19th July, in which they stated that the members of Committee had "differed in opinion as to whether there should be an increase on the Small Debt jurisdiction," but that they did not consider the Bill of 1887 satisfactory; but they did not otherwise deal with the general subject remitted.—

The present remit is made only to consider the Small Debt (Scotland) Bill, 1888. The wider remit has not been renewed. The members added to the former Committee are not members of this Committee, and the Committee consider that they ought to confine their observations to the Bill remitted, and cannot usefully enter on any more general inquiry.

The Committee consider, however, that they may properly express the opinion that, while there may be some advantage in providing a remedy for various defects experienced in practice in working the Small Debt Act, no radical change should be made

in regard to Small Debt actions in a measure which takes no cognisance of the Debts Recovery Act, or of the ordinary procedure and arrangements in Sheriff Courts.

Section 2. The present Bill differs from last year's Bill mainly in the provision of the second section, which proposes a simple extension of the Small Debt Act to all actions for sums not exceeding £25, instead of the provision in the former Bill, which proposed to extend that Act to cases of any value, but required the consent of the defender.

This is much the most important clause in the present Bill, and involves, it is thought, a change too radical in a Bill which does not deal with other forms of Sheriff Court procedure. The large majority of the Committee are opposed to the proposal. They are not aware that any need for such an extension has been widely felt, and they do not think it would be expedient.

Considering the facilities for inexpensive litigation furnished by the Debts Recovery Act, and the power conferred by section 23 of the Sheriff Court Act of 1853 to have any cause tried, with consent of parties, under the provisions of the Small Debt Act, the Committee think there is no call for the proposed extension; and they consider that, while, undoubtedly, the provisions of the Small Debt Act are applied with great advantage in cases involving small sums, and where extreme economy is a paramount consideration, it would be unsatisfactory and dangerous to apply them to more important cases; and they think that a defender should not be compelled to submit to a trial of his cause in that manner.

The expense and delay attending ordinary procedure may be lesser evils than the risk of error which certainly attends Small Debt proceedings; nor is this objection adequately met by the provision for an appeal; for if an appeal were taken, the advantage of cheap and rapid procedure would disappear; delays might arise in defending the case and otherwise, and, after all, the facts would probably not be ascertained with such accuracy as by the ordinary methods.

It is supposed that the provision for an appeal is an essential condition of the extension of jurisdiction. But, if this Bill were passed, the law as to appeals would be left in a most anomalous, not to say absurd, condition. If an action for £20 were brought in the Small Debt Court, there would be an appeal to the Court of Session on the law, and none to the Sheriff. If such an action were brought in the Sheriff's Ordinary Court, or under the Debts Recovery Act, there would be an appeal to the Sheriff both on law and fact, but none to the Court of Session. If an action were remitted from the Ordinary Court to the Small Debt Court, under section 4 of the Small Debt Act, there might apparently be an appeal to the Sheriff and to the Court of Session also; and whenever pleadings in a Small Debt action were ordered under section

14 of the Small Debt Act, the right of appeal to the Court of Session would apparently be straightway lost.

Sections 3 and 4, which regard Decrees of Consent, are substantially the same as in the former Bill. The following remarks, which we adopt, are quoted from the Report submitted last year :—
 “3, 4. It frequently or sometimes occurs in Small Debt Courts that a pursuer is not aware whether the action is to be defended, and is obliged to be present at the first diet with his witnesses, only to find the defender absent. It is certainly very desirable that a remedy should be found for this unnecessary expense to the parties and inconvenience to the witnesses. The Committee do not, however, think that the provisions in these clauses would prove effectual. They suggest that it should be provided that when a defender is absent at the first calling, decree should be pronounced in favour of the pursuer although he be absent; and that when a defender is present and desires to defend, the cause should stand adjourned without any finding of expenses, unless the defender has given previous notice to the Sheriff-Clerk of his intention to defend, in which case, if the pursuer be absent, there should be absolvitor; or unless the pursuer is ready to proceed, when the case should be disposed of. In order to afford time for the defender's intimation to the Sheriff-Clerk, and the communication of that intimation by the Sheriff-Clerk to the pursuer, it would probably be necessary that the *induciae* should be extended.”

Section 5 is new, and provides for sisting the representatives of parties on verbal application. The clause is expressed at needless length, but the provision seems expedient.

6. Corresponds to section 5 in the former Bill, which provided for amendment of a Small Debt summons, but it provides also for the simplification of services, citations, and other steps of procedure, and is, we think, an expedient proposal.

7. Corresponds to section 6 of the former Bill. It regards warrants of ejection from dispenished premises, and does not seem open to any material objection.

8. Provides that power to open lockfast places should be implied in warrants and decreets: is new, and would probably be useful.

9. Authorizes the employment of agents in all causes. Of this clause the Committee approve, but some of the members suggest that for the words “an agent,” there should be substituted the words “a duly qualified law agent or his clerk.”

10. Corresponds to 8 in the former Bill, and authorizes decrees to a limited extent for instalments to become due. The Committee approve of this clause.

11. Regards the disposal of causes which the Sheriff takes to *avizandum*. We think the Sheriff should be authorized to issue his interlocutor, if he thinks proper, in the manner in ordinary

use in the Sheriff Court. The former Bill contained a clause providing for intimation to the parties, when they are not present. This has been omitted in this Bill, but was, we think, a proper provision.

12. Is new. It simplifies charges and abrogates indorsations of warrant. It appears beneficial.

13, 14. Contain the provisions as to appeal, the form being that provided by the Summary Prosecutions Appeals Act, but they allow seven days for appeal instead of three. Section 14 seems imperfectly expressed, and it would be necessary to frame the provision so that seven days should be substituted for three days throughout the 14th section of the Summary Prosecutions Act. The members of Committee are not entirely at one on this question. The majority are in favour of an appeal, if the jurisdiction of the Court is extended, but not otherwise; others would allow an appeal in any case in which the Sheriff thinks the question of general importance, and one member is in favour of the proposed provisions, whether the jurisdiction is extended or not, conceiving that the conditions as to caution and consignation form a sufficient guarantee against abuse.

15 and 16. Contain what we think salutary though not very important provisions as to extracts and expenses.

In the former Report the Committee suggested that a provision should be inserted for supplying a Small Debt decret if it be lost, a mischance for which we believe there is at present no adequate remedy. Such a provision might be added to clause 16.

A provision to the following effect was also suggested, and the Committee consider that it would be found very beneficial: "Actions for restitution and delivery of personal or moveable property shall be competent in the Small Debt Court, provided the actions contain a conclusion for payment of a sum on the defender's failure to deliver the property concluded for, which sum does not exceed £12."

There is no proposal by this Bill to affect the provisions as to poinding in the Small Debt Act, which are contained in the 20th section. But there is a Bill in reference to poinding at present before Parliament in which it is proposed to repeal these provisions. The chief object of this Bill appears to be to reduce the cost and hardship of poindings, by putting them under the charge of officials to be appointed by the Sheriff, and called in the Bill, Auctioneers of Court. The Committee have not had time adequately to consider that Bill, and it is not the province of this Committee to report on it. The Committee may notice, as germane to the subject of this report, that section 20 of the Small Debt Act relates to sequestrations and arrestments as well as to poindings, whereas the proposed Bill seems to relate to poindings only. It is proposed also by that Bill to repeal section 21 of the Small Debt Act, but the reason for doing so is not apparent.

These Bills suggest the importance of measures of this nature being dealt with, if at all, in a more comprehensive manner, and in a Government Bill. A valuable and safe result is hardly to be expected from unconnected Bills, introduced by private members who entertain particular views about some special matters connected with Court procedure, which have happened to attract their attention.

W. E. GLOAG, *Convener*.

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SOME interesting reminiscences of the Cape Bar and Bench are contributed by the Hon. Mr. Justice A. W. Cole to the February number of our contemporary the *Cape Law Journal*. The following are a few extracts:—

"In the Master's Office in Capetown there is a nondescript article of furniture made of laurel wood and cane. It is something like five cane-backed and cane-seated chairs all joined together. It is as strong and serviceable as it was on the day on which it was made, though it must date from the commencement of this century. It is the bench of the old High Court of Justice of the Cape of Good Hope; the bench on which used to sit the five grave and reverend signors who were the judges under the Batavian Government of this Colony. One can imagine them with their pointed beards, flowing robes, big ruffles, three-cornered hats, and long clay pipes. 'Pipes on the Bench!' you will exclaim. Quite true, however; their Honours used to smoke diligently while listening with all gravity to counsel and witnesses. The late Sir Christoffel Brand used to say that he had seen them thus engaged, and he silyly added that it had one good effect—it prevented judges from perpetually interrupting advocates in their arguments, which I fear is a propensity with which some of us are afflicted."

"In the year 1832 the Royal Charter of Justice creating the Supreme Court of the Colony was issued, and on the 1st March 1834 that Court held its first sitting. The judges were the Chief Justice Sir John Wylde, Mr. Justice Burton, and Mr. Justice Menzies. Of these the only one still living when I joined the Cape Bar was Sir John Wylde, though he had already been struck by paralysis, and was unable to take his seat on the Bench. I made his acquaintance, nevertheless, and found him an exceedingly pleasant and genial old gentleman, with the manner and style of speech of a bygone generation. He was a brother of the celebrated Sergeant Wylde, afterwards Sir Thomas Wylde, and eventually Lord Truro, and Lord Chancellor of England. Apparently the brothers were no great admirers of each other. Sir John used to say, 'That brother Tom of mine owes all his success to his loud voice and boisterous manner.' Sir Thomas said, 'Poor John mistook his vocation: he ought to have gone on

the stage.' There was a little truth in both opinions. Sir Thomas was a very noisy advocate, but a man of vast ability. Sir John had not a tenth part of his brother's legal knowledge, and certainly was apt to be theatrical in his manner and language. One or two stories will indicate his propensity in that direction. A woman had been convicted of the murder of her husband, and Sir John, who had to pass sentence of death on her, thus addressed her: 'Woman! woman! where is thy husband?' which the interpreter rendered by 'Vrouw, vrouw, waar's uw man?' Sir John continued, 'Alas! he has gone to that bourne from whence no traveller returns!' The interpreter said, 'Hij is op tocht gegaan.'

"Fortunately Sir John knew no Dutch, or he might hardly have appreciated the interpreter's ingenious translation of his Shakespearian sentence. On another occasion he addressed a convicted thief as 'You miserable man,' and the same interpreter rendered it, 'Gij verdeomd schelm!' Even Sir John's ignorance of Dutch could not hide from him the fact that the interpreter had rendered him as using profane language on the Bench, and his reproof to that gentleman is said to have been eloquently indignant."

"In the Circuit Court of George a case was called on before Judge Burton: Mr. E. held the plaintiff's brief. Now Mr. E. was a very clever advocate, but seldom took the trouble to really study his brief. On the present occasion he had scarcely looked at it, and having to state the case to the judge earlier than he expected, he made a blunder at almost every sentence. The attorney who instructed him was a very nervous and fidgety little man, and sat behind him. He kept crying in a loud whisper, 'No, sir—no; read your brief, sir.' Mr. E. continued blundering till the attorney could endure it no longer. Rising up, he seized Mr. E.'s ears from behind (they were very large ones), and, swinging his head from side to side, shouted, 'Read your brief!' It would be difficult to say who in the Court was most astonished. The poor little attorney, realizing what he had done, fell on his knees and entreated his lordship's pardon, but he really 'could not help it.' The judge was half stifled with smothered laughter, and a loud guffaw burst from all the rest of the assemblage, except from Mr. E. Eventually the attorney was let off with a severe reprimand, and the case postponed for an hour, so that Mr. E. might read his brief."

"The first Attorney-General of the Colony after the establishment of the Supreme Court was Mr.—afterwards Sir Anthony—Oliphant, father of the celebrated living author, Lawrence Oliphant. Sir Anthony must have been an eccentric character. He appears to have never been on good terms with his wig—for they wore wigs in the Supreme Court in his days—which used to get twisted about in an extraordinary way, so that on one occasion he was

startled by finding his nose being tickled by one of the little horse-hair tails which ought to have rested on his back. Being an inveterate smoker, he always went outside the court when he had finished his speech, and smoked in the porch, where he could still hear his adversary's argument. In the days of the old High Court of Justice no doubt the judges would have granted him a special dispensation to smoke in the Court itself."

"Many of you will no doubt remember the late Sir Sydney Bell, who was for many years a Puisne Judge and afterwards Chief Justice of the Colony. A man who had his peculiarities, amongst which were two prominent ones—great kindness of heart, and a dislike of pomposity. A well-known old district surgeon of the Paarl (now gathered to his fathers) was giving evidence as to the injuries found on a man who had been badly assaulted. 'Anything else?' asked the Attorney-General. 'Well,' said the doctor, 'there was a slight abrasion of the nasal epidermis.' 'Do you mean that the skin of his nose was scratched?' asked the judge. 'Yes, my lord.' 'Then why didn't you say so?' asked Sir Sydney, rather snappishly."

"The same judge was very keen in detecting and exposing false pretences. At a Worcester Circuit Court, a Clerk of the Peace, under the old system, appeared to argue a case before him, and had the audacity to quote Voet in the original Latin. The judge at once saw that the man knew nothing of the language. 'Give me the English of that,' he said. 'I beg your lordship's pardon?' stammered the would-be learned gentleman. 'Give me the English of that,' repeated the judge. 'I—I—I thought your lordship understood the Latin.' 'No, I don't; *do you?*' The titter that ran round the court was disconcerting, and the judge was charitable enough to let off the offender with only a glance of disgust."

"The same judge used to tell a story of one of his experiences while Recorder of Natal. Some assault case had been heard in which a man named Murphy was a witness: a woman had been called, but could throw little light on the case, as she admitted that she had been fast asleep while the disturbance was going on. The judge, in the course of his address to the jury, remarked that there was not much to be made of this woman's evidence, as she was evidently most of the time 'in the arms of Morpheus.' Up sprang the woman in the middle of the court: 'My lord, my lord, don't take away my *character*; I was never in Murphy's arms in my life!'"

"A kind and genial gentleman was Sir William Hodges, but he was apt to be a little too lenient with sheep-stealers. A prisoner stood an excellent chance of being let off with a mere nominal punishment if he pleaded that hunger had made him steal; for Sir William was disposed to believe that most farmers half-starved their servants. A man who had stolen 30 sheep at once put

forward this plea of hunger, but that was too strong even for Sir William. Another, who had stolen a whole flock of 400 or 500 sheep, was asked how he came to take such a number. The Kafir's reply was, 'I wanted to start sheep-farming in my own country, because I heard that it paid so well.' On circuit with Sir William was, on one occasion, the gentleman who is now himself Chief Justice, but was then a barrister. He is an admirable shot, and one day he brought down a fine paauw. Knowing that he was going to stay at an hotel where the bird would go a very short way among the multitude of guests, he sent it as a present to Sir William. They did not meet again until the court had closed, and they were once more on the road. Sir William came up: 'I have to thank you for that paauw, De Villiers; it was a very fine bird indeed. But, I say, is it not out of season?' 'Oh, but, Sir William, travellers are specially allowed by the Ordinance to shoot in or out of season.' 'Ah! yes; but doesn't that mean for their own consumption?' 'Well, Sir William,' was the reply, 'when I sent you that bird, I thought, of course, you would invite me to dinner.'"

"I don't know whether barristers on circuit have any trouble now-a-days in getting their fees paid. There used to be a little sometimes in days of yore; but I believe I can relate an experience of one of the gentlemen now holding a seat on the Bench here. He had successfully defended a prisoner, and after the trial applied to the agent who had instructed him for his fee. The agent declared that he had done his best to get the money from his client, but had not yet succeeded, and advised the advocate to appeal to the man himself. This he did, and the reply he received was, 'What are you to get a fee for? The jury said as I ain't guilty, didn't they? then why should I pay you?' If I have spoilt the anecdote, the gentleman will forgive me."

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF STIRLING, DUMBARTON, AND
CLACKMANNAN.

Sheriff SCOTT-MONCRIEFF.

PRIDE OF GRANGE LODGE v. STEEL.

Friendly Society—Right to sue expelled members for arrears.—Held, incompetent to sue a former member of a Friendly Society for the arrears which led to his expulsion.

This was an action raised in the Small Debt Court at Falkirk at the

instance of the Pride of Grange Lodge, Ancient Shepherds Friendly Society, against John Steel, for payment of £1, 6s., being his amount of arrears of contributions for one year. Steel, in consequence of his arrears, had been, in accordance with the rules of the Society, expelled.

The Sheriff-Substitute, upon the 29th February last, pronounced the following judgment :—

“ There does not appear to be in the rules of the pursuers' lodge any authority for instituting such an action as the present, nor is there in those of the Loyal Order of Ancient Shepherds (Ashton Unity), the parent Society. But the rules of the Glasgow district, of which the Pride of Grange is a branch, are incorporated into those of the latter, and amongst them is the following reservation : ‘ This lodge shall reserve to itself the power of instructing its officers to enforce payment of arrears should the same be deemed expedient.’ I believe, upon what I consider correct information, that such a provision is unusual, and not to be found in the rules of any other society sanctioned by the Registrar of Scotland, and I am rather inclined to think that there must have been an oversight in allowing such a rule to pass. But this rule, giving it due effect, had not the effect of a statutory clause, it merely afforded the officers an opportunity of trying whether payment of arrears would be enforced in a Court of equity. In my opinion the one penalty for failing to pay contributions is expulsion from the Society. The contributions are voluntary : upon payment of them a member is entitled to certain privileges. If there is failure to pay, the member receives no benefit, and is expelled. It was contended for the pursuers that as under the rules the defender was not suspended from the benefit of the Society until fourteen weeks had elapsed, the Society was at least entitled to recover the arrears for that period. But I do not see my way to give effect to this distinction. If during that period any benefit had been claimed, no doubt the Society, in paying to the defender's representatives, would have taken care to deduct the arrears. In point of fact no benefit was derived by the defender, who, of course, had forfeited all payments made by him prior to the period when he fell into arrears. I therefore give judgment in favour of the defender.”

Act. Gibson—Alt. Party.

Notes of English, American, and Colonial Cases.

BILL OF EXCHANGE.—*Dishonour—Damages—Bill dishonoured abroad—Interest—Re-exchange—Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), s. 57, sub-s. 2.*—Under section 57 of the South Australian Bills of Exchange Act, 1884 (which, except as regards the rate of interest, is identical with section 57 of the English Bills of Exchange Act, 1882), the holder of a bill of exchange which has been dishonoured abroad—that is, out of the colony—can only recover by way of damages the amount of the re-exchange, with interest, under sub-section 2 of section 57 ; and he cannot sue for interest under sub-section 1.—*In re Commercial Bank of South Australia*, 57 L. J. Rep. Ch. 131.

MEDICAL PRACTITIONER.—*Partnership*—*Assistant*—*Agreement by assistant* “not to set up or carry on business or profession of surgeon”—*Construction*—*Joint or several*—*Dissolution of partnership*—*Assistant in employ of one partner*—*Breach of agreement*—*Injunction*.—A. and B. carried on business as medical practitioners at N., and they took C. into their employ as assistant. C. gave A. and B. a bond, which recited that one of the terms upon which C. was taken into the employment of A. and B. was that he should “not at any time set up or carry on the business or profession of a surgeon, accoucheur, apothecary, or physician in N. or within ten miles thereof,” and the condition of the bond was that C. should not at any time thereafter, directly or indirectly, and either alone or in partnership with or as assistant of any other person or persons, or otherwise howsoever, set up or carry on the profession or business of a surgeon, accoucheur, apothecary, or physician, or any branch thereof, or any professional business connected therewith, within the town of N. or within ten miles thereof. The partnership between A. and B. was dissolved. They then carried on business separately at N., and C. entered into the employ of B. A. brought an action against C. to restrain him from acting as assistant to B. in breach of the above agreement:—*Held*, that the agreement was entered into by C. with A. and B. jointly and severally, and that the partnership having come to an end it could be enforced by either of them; and that it was a breach of the agreement—“not to set up or carry on the business or profession of a surgeon”—to act as assistant to another person who was carrying on such a business or profession, and that the injunction asked ought to be granted.—*Palmer v. Mallett* (App.), 57 L. J. Rep. Ch. 226. *Allen v. Taylor* (19 W. R. 556) distinguished, *ibid*. Decision of Chitty, J., affirmed, *ibid*.

SHIP.—*Mortgage*—*Mortgagees in possession*—*Right to freight*.—In October 1883, W. mortgaged to the plaintiffs certain shares in a ship. Subsequently W., who was captain and ship's husband of the ship, incurred liabilities to the defendants for goods supplied to and disbursements made for the ship. In March 1886 the ship was chartered for a voyage from Montreal to Liverpool, the freight being payable one-third at Quebec and two-thirds on right delivery of the cargo in Liverpool. Immediately upon arrival of the ship in Liverpool, the plaintiffs took possession, and gave notice to the owners of the cargo to pay the freight to them. The defendants afterwards obtained judgment against W., and obtained garnishee orders upon the receivers of the cargo attaching the freight due from them:—*Held*, by Smith, J., that the defendants had no right to the freight as against the plaintiffs.—*Japp v. Campbell*, 57 L. J. Rep. Q. B. D. 79.

ERRATA in report of the case of *DAWSON v. RITCHIE*.
Page 164, line 9, for “*viæ publicæ solum alienum est*” read “*viæ private solum alienum est* ;” and line 10, for “*agendi*” read “*agendi*.”

THE JOURNAL OF JURISPRUDENCE.

THE PHILOSOPHICAL SCHOOL OF LAW.

BY PROFESSOR BLUNTSCHLI.

It has again become common, especially since Gans, to speak of a *philosophical* School of Law, and to put in contrast to it a *non-philosophical* School, in the same way as the Historical School was formerly put in antithesis to such as were not historical. Gans himself went still farther, and even designated the Historical School as the one that was not philosophical. This would certainly be the extremest opposition of the Schools, as the one of them would thus directly negative the other.

Now it is undoubtedly true that there are some jurists who directly deny the value of speculation and philosophy. There are jurists, in fact, who are lacking in the sense for higher ideas,—ideas, indeed, which have often not at all, or but very incompletely, realized themselves in the manifestations of the external life of the past. Some of them may reckon themselves as belonging in some way to the Historical School, while others of them may have habituated and fixed themselves in a mere rigid traditional practice. The Historical School as such has, however, never fallen into such perversity, not even when in the first period of its emergence it might have been inclined, in the feeling of youthful power, to an over-estimate of its own value.

Two points, however, must be admitted. In the first place, the Historical School undoubtedly looked down somewhat incredulously, and sometimes even contemptuously, upon the systems of Natural Law of the older times, which, after the manner of the advertising of quack remedies for all conceivable diseases, proclaimed their purely universal laws for all peoples and all times. The Historical School did not trust this vain-glorious puffing, and was soon convinced that much of this so-called "Natural Right" had only arisen by taking Roman Law along with all misunderstandings and errors of it, and making it the foundation of the modern theory, by excluding as much as

possible of what was individual in its constituents, and by conveniently watering down the residuum that remained. Being better acquainted with the Natural Roman Law, the representatives of the Historical School turned away with disdain from such insipid slops. And, on the other hand, the more they learned to know of other systems of Right,—especially the German system, which distinguished itself from the Roman, and yet was not irrational,—so much the less could they reconcile themselves to the thought that the Roman Law was a *ratio scripta*. Accordingly, it is not to be disputed that the Historical School for a time neglected the philosophical method, and left it uncultivated. The earlier results of the tendency to promote insight into the nature of Right in a philosophical way, could not give satisfaction. In this connection the words of Goethe seem to be quite applicable—

“ A fellow speculating,
Is like a beast on dry parched ground,
In circles driven by th' evil spirit negating,
While fair and greenening pasture lies around.”

Was it surprising that the younger robust minds should have turned away from the dry heath of Natural Right to the green meadows of the positive systems of Law? Here they found rich life and the strong material of manifold real facts. Thus the adherents of the School for a time let the general question of Right alone, and turned their attention the more closely to positive Law. They avoided involving themselves in controversies about the general question, and found work enough in the renewed and living treatment of the particular systems. In this way the Historical School bore itself at first, not, indeed, as directly negative of the Philosophical Jurisprudence, but certainly in an attitude of indifference, and unsympathetically towards it.

However, it could not continue so as the historical insight into the jural life advanced. And as the process of inquiry approached modern times, it could not but come in manifold ways, and, especially in connection with the modern development of Right, upon the fact of a *practical influence of philosophy* upon the development of the jural system of every period. This influence showed itself everywhere, both in the sphere of public and of private Right. It could not be overlooked that the modern Private Law rested at all events upon the Roman and German systems and their connection; but (apart altogether from the Canon Law) a third element showed itself at the same time in the influence of philosophy. If this influence had also sometimes been unfavourable, and if there are even several doctrines—such as that of contract—which had been much injured by it, yet, on the other hand, the modern systems of Law had gained in spiritual elements, and had been unquestionably elevated in many respects through philosophy. A new spirit had manifested itself, and it

had been working powerfully upon life, both destructively and creatively. Philosophy held prominently aloft the banner of the modern spirit; it sharpened the weapons of its representatives, and achieved in this connection real successes. And thus did it introduce itself with a determining influence into the history of the development of Law. On this account the genuine Historical School could not leave the significance of philosophy in relation to the historical development of Right, permanently out of account. It was thus compelled to recognise the creative side of the human mind and of human freedom, and to listen to its expression.

Moreover, on the other hand, the historical direction could not satisfy many of the more philosophically constituted and more philosophically trained minds. The contrast between the historical and the speculative methods in the sciences is indeed in its deeper bearing not a hostile one, but it cannot but appear strongly in all the external oscillations of jurisprudence. If the Historical School did at the outset neglect Philosophy, it was in accordance with the order of time that Philosophy should again help itself to its rights. In antiquity this opposition already comes into view from time to time, and it distinctly appears in the contrast between Plato's Republic and the Politics of Aristotle. It may be said to characterize the whole of modern science. Some thinkers have, in fact, pre-eminently received the faculty and endowments fitting them for discovering and maintaining the higher unity in human knowledge, for apprehending first causes, and bringing the divine and human ideas into human consciousness, and for conceiving and exhibiting the eternal, the identical, the essential. Others, again, keep mainly to the external manifestations of real life, to what is finite, changing, and moving. The perception of positive forms, and the attentive investigation and contemplation of history, enlarge their knowledge and illuminate their thoughts.

Each of these two directions has its own special dangers and its peculiar advantages. The great danger of that tendency, which we may call the *philosophical*,—a danger which has often overwhelmed even excellent minds,—is that it easily leads away by apparently logical inferences to the production of empty formulæ that are void of all real substance, or to the spinning out of a regular but untenable and unusable web of phrases. The danger of the other *historical* method is that unreflecting cultivators of it store up mere dry notices of facts, or fill up an anatomical museum with antiquarian skeletons that are without spirit and life. But even these respective aberrations of the Schools regularly contain the germ of something better, for even abstract intellectual error often again stirs up others to new investigation of truth; and the dead collections of material commonly serve the purpose of animating an inquirer to making manifold use of it.

These oppositions, however, are not fixed, but tend to coalescence; for the speculative thinker requires some external stimulus through experience and history in order to know the ideal, and the historical investigator cannot grasp history unless he perceives its higher significance and the enduring spiritual substance that is in it. Hence neither of them may be exclusive on either side. The philosopher is not entitled to despise the historian, nor the historian the philosopher. And for this reason there should not be a *philosophical School* in jurisprudence which denies the existence of the *historical method* in the science, nor a historical School which is in conflict with philosophy. Much rather is it the case that, as some men will be always more specially qualified by their gifts, and will always devote themselves more to the one than to the other side of science, so the two directions must be mutually honoured and recognised. This difference in the capacity and tendency of scientific thinking is still so much in operation even at present, that it is convenient to speak of a philosophical and of a scientific School of law. This may indeed be done; but it is better to speak, not of *different Schools*, but only of *different methods*, because the consciousness of the necessity and relative truth of each of the two directions has been received into the common consciousness of science, and because the philosophical School is no longer to be regarded as not historical, nor the historical School as not philosophical.—We have thus again experienced how much truth the English Chancellor, Lord Bacon, spake, even for our time, when he said of the one-sidedly empirical jurists of his day, “*tamquam e vinculis sermocinantur*,” and of the teachers of the abstract doctrine of natural law of his time, “*proponunt multa dictu pulchra sed ab usu remota*.” We now know that history is without life if the nature of the inner spirit is hidden from it, and that philosophy is but a dreamer of visions if it does not give heed to the corporeal formations of things in which the spirit manifests itself. It is only where history and philosophy reach the hand to each other, and seek in close union for the truth, that knowledge arises in its full splendour.

Accordingly, in recent times, there has been an essential change in their relations. Whilst England, almost *too historical* in this connection, has produced in Bentham the most decided anti-historical jurist and the most logical representative of juristic radicalism; on the other hand, in the philosophically cultivated Germany, philosophy has again become positive and historical; and thus again the proof has been given in fact that it is possible to bring the philosophical and historical views of Law into harmony.

And so indeed it will always be. If some, conscientiously, and with minds open to the truth, rather prosecute the philosophical direction, and others devote themselves in a similar way to historical inquiry, they will both bring results to light which, instead of con-

tradicting and excluding each other, will be found rather to mutually confirm and complete each other. For, *Truth knows no Schools, and Science only recognises the Schools as individual and transitory factors in its development.*

THE STORY OF THE CHAIR OF PUBLIC LAW IN THE UNIVERSITY OF EDINBURGH.

BY PROFESSOR LORIMER.

A FACULTY of Law was included in the original scheme of each of the three older Universities of Scotland; and both at St. Andrews and Glasgow, Canon and Civil Law were occasionally taught. Bishop Elphinston, by whom King's College in Aberdeen was founded in 1494, had himself been a professor of Canon Law at Paris, and of Civil Law at Orleans; and in his Statutes he enacted that the Canonists at Aberdeen should teach after the manner of Paris, and the Legista after the manner of Orleans. To him, too, is ascribed the suggestion of the enlightened statute of King James IV. 5, c. 54 (1494), which enacted that barons and freeholders should send their sons and heirs to the grammar schools, till "they be competentlie founded and have perfite Latine, and thereafter to remain three years at the schules of art and jure, swa that they shall have knowledge and understanding of the laws." In 1501 Elphinston further obtained an indulgence from the Pope, with the object of encouraging the study of civil law amongst ecclesiastics of all classes, with the curious exception of the Mendicant Friars.

The Reformers' scheme for remodelling the University of St. Andrews assigned to St. Salvador's College the privilege of granting degrees in law after one year's course in Ethics, Economics, and Politics, and a four years' course under two readers in Municipal and Roman Law.

In Edinburgh the first serious effort to introduce the scientific teaching of jurisprudence appears to have been made by Reid, Bishop of Orkney, who, amongst his many offices and preferments, was President of the Court of Session. Reid left a bequest for the endowment of a School of Arts and Jure, the object of which appears to have been to carry out the provisions of the statute just referred to. But, as in the case of another "Reid-bequest"¹ that we know of, the founder's will was treated with scant respect. After tracing this discreditable transaction through its various stages, Sir Alexander Grant² concludes his narrative thus: "And so it came to pass that the only memorial of Bishop Reid's muni-

¹ For the Music Chair.

² In his *History of the University of Edinburgh*.

ficient purpose to endow a college 'of Arts and Jure' in Edinburgh existed for some time (though it has long since passed away) in the name given to 'fourteen little chambers' which formed part of the original College buildings, and which were called 'the old Reid chambers.'"¹

Another miscarriage took place when, in 1500, a Professorship of Laws was actually founded by the Lords of Session, the Town Council, the Advocates, and the Writers to the Signet. Two professors were successively appointed to it, but for some mysterious reason they taught nothing but classical literature.

Subsequent to the foundation of the Court of Session, it is probable that, in addition to the instruction by apprenticeship which must always have existed, instruction of a more scientific character, both in civil and municipal law, was given privately by members of the Bar. This, however, was less with a view to the completion of a legal education in Scotland, than by way of preparation for the foreign study which, long after the foundation of the University in 1582, and even after the Union in 1707,—down indeed to the French Revolution,—was considered indispensable for admission to the Bar. But slight and elementary as it no doubt was, I think we may assume with some confidence that the teaching of jurisprudence in Scotland even at this early period was not destitute of a scientific character. In addition to the care with which the connection between classical and legal studies was maintained, and the special provisions which we find for a philosophical and historical ground-work being laid in ethics, economies, and politics, this assumption seems to be warranted by the preponderance of the ecclesiastical over the lay element on the Bench. It was by the canonists rather than the civilians that the study of the *jus naturale*, as a substantive branch of science, was carried on; and it was by them, as I shall show you hereafter, that its importance as the basis of the *jus inter gentes* was pointed out. Scotland was so entirely separated from the Roman Catholic world by the Reformation, as scarcely to have felt the influence of the Spanish School of Jurisprudence, which culminated in Suarez of Grenada, and to which the Protestant writers who followed them owed more than they were willing to acknowledge. It is possible that the teaching of Alberico Gentile at Oxford may not have been wholly unheeded in Scotland; but though Gentile was a Protestant he was not much of a philosopher, and it was to Grotius and his followers, unquestionably, and to the intimate relations which then subsisted between the intellectual life of Scotland and of Holland, that we were indebted for our introduction to the study both of scientific jurisprudence in general, or natural law, as it was called, and of the law of nations. It was from this source that Lord Stair drew the inspiration which enabled him to bring science to bear on our municipal system with a definiteness of

¹ Grant, vol. i. p. 169.

conception and clearness of expression which has never since been equalled by our text-writers; and it has always seemed to me probable that it may have been at Stair's suggestion that this particular chair, if not the Faculty of Law itself, was founded. Stair's great work was published in 1681, and he died in 1695, twelve years before the foundation of the Public Law chair; and there consequently can be little doubt as to the correctness of Sir Alexander Grant's conjecture, that it was to the great Carstairs,—“Cardinal Carstairs,” as he was called,—who was Principal of the University from 1704 to 1715, that we owe it more directly. Still it is worthy of remark that Stair went to Holland in 1682, and Carstairs returned to Holland after his secret mission to Scotland in 1685, and that they both remained in Holland till 1688, when they returned with the Prince of Orange. From 1685 to 1688 these two remarkable men were together, and in constant personal intercourse in Holland. Both were philosophers, theologians, and politicians, and Stair could scarcely have failed to point out to Carstairs the relation between these subjects of common interest and his own speciality as a jurist; whilst Carstairs, who had studied at Utrecht, would be able to explain to Stair the arrangements by which this relation was recognised in the Dutch Universities. There was another Scottish exile of distinction in Holland at this time, who also formed one of the party that landed at Torbay, viz. Robert Dundas, the second Lord Arniston; and it is interesting to reflect that during the long and stormy passage the three Scotsmen may have talked over the prospects of Scottish Jurisprudence in the intervals between the political and ecclesiastical discussion which no doubt mainly occupied them. Dundas was not a man of the same intellectual calibre as Stair or Carstairs, but he was a man of cultivated and scholarly tastes; and, as he lived till 1729, his Dutch experiences may have enabled him to aid Carstairs with his counsels.

But from whatever direction the influences may have come which led to the formation of the Faculty of Law, we are not left to conjecture as to the School of Jurisprudence, of which this particular chair was an offshoot. One of the students in my class found in an old bookstall, and kindly brought to me, the curious little book which Sir Alexander Grant has described in a note.¹ It is a compendium of Grotius's *De Jure Belli et Pacis*, by William Scott, who was one of the regents at the time. It is dedicated to the Lord Provost and Town Council, and on the copy in the library is written *ex dono Authoris*, 4to Aprilis, 1707. “In a Latin preface Scott tells us that the book had been printed for the use of a private class, to whom he had previously dictated its contents as a preparation for wider studies, and he gives in full his opening address, delivered in his private class-room (*in auditorio privato*), on the study of Grotius. This shows,” Sir Alexander

¹ Vol. i. p. 233.

continues, "that there was some little demand among the students of the college for lectures on the Law of Nature and Nations. It is possible that Carstairs may have suggested the delivery of these lectures, as a first step towards the foundation of a chair. But under the circumstances it is remarkable that the chair when founded should have been given to Areskine and not to Scott." The coincidence between the date of the publication of Scott's book and the foundation of the chair, 1707, may be taken, I think, as indicating that Scott was a candidate for it. Its dedication to the Town Council seems to show that it was on their influence that he relied; and their leaning in his favour may have had something to do with the bitterness with which they resented what they regarded as the high-handed action of the Crown in placing Areskine in the University without their consent.

From all these circumstances, I think, it will not be doubted that when this chair was ultimately founded in 1707, its object, as Sir Alexander Grant has said, was to provide "a scientific and philosophical basis for a future Faculty of Laws, in imitation perhaps of the Dutch Universities."¹ The School of Grotius was that which was then uppermost in the minds of Scotsmen, and the Faculty of Law from the first was manifestly intended to cover the whole field of Jurisprudence, and to embrace legislation as well as jurisdiction.

1. Its first occupant was Charles Areskine, or Erskine, of Tinwald, 1707-34. He came of a race, or rather I ought to say of races, which had been distinguished in the law long before him, and continued to be so long after him. "His grandfather, the Honourable Sir Charles Erskine of Alva, fourth son of John Earl of Mar, and of Lady Marie Stewart, daughter of the Duke of Lennox, married Mary Hope, second daughter of Lord Advocate Sir Thomas Hope. Of this marriage was born Sir John Erskine of Alva, father of the Professor. His mother was Christian, daughter of Sir James Dundas of Arniston. Erskine is said to have studied for the Church; but he soon abandoned the idea of taking orders. When only twenty he was appointed one of the Regents of the University of Edinburgh. He held this office, in which he taught Logic, Ethics, Metaphysics, and Natural Philosophy, until 1707, when he was made Professor of Public Law."² It is not quite fair to say, as Sir Alexander Grant has done, that there is no indication of his having taught except "a brief inaugural address, written in Latin, upon God as the fountain of Law."³ Mr. Omond, in a note, gives the following advertisement from the *Scots Courant* of 12th to 14th November 1711: "Mr. Charles Erskine, her Majesty's Professor of Public Law in the University of Edinburgh, designs to begin his private Lectures on the Laws of Nature and Nations, on Friday next at 5 o'clock

¹ Vol. i. p. 233.

² Omond's *Lord Advocates of Scotland*, vol. ii. p. 1.

³ Vol. ii. p. 314.

in the afternoon, at his lodgings in Fraser's Land." ¹ What came of this pious design I cannot tell, but I fear it must be admitted that Areskine was not a very zealous professor. Immediately after his appointment he went to Utrecht to study law. This may have been in order to prepare for the duties of his chair, as well as with the view of his admission to the Bar; and his being abroad during the Jacobite rising in 1715, in which several of his kindred came to grief, was a proof of his political discretion and no disproof of his professorial zeal. His subsequent travels with his brother Robert, physician to Peter the Great, when he wrote to his wife that "she must be thinking he had taken service with the Czar of Muscovy," may have been very instructive to him as an international jurist. But any aspirations after distinction in that capacity which he may originally have cherished, were speedily extinguished by the temptations held out to him by his professional success and the Court favours which he owed to his family connections, and still more to the patronage of the great Duke of Argyll. His reluctance to sever himself from an office which brought him in contact with the philosophical studies of his youth may probably have been the cause of his continuing to hold the chair for the long period of twenty-seven years. But how incompatible the discharge of its duties must have been with his other avocations, will be seen from Mr. Omond's narrative of his subsequent career. He was called to the Bar on the 14th of July 1711. In 1714 he was an Advocate-Depute. He became one of the leaders of the Bar; purchased the estate of Tinwald in Dumfriesshire; and in April 1722 was returned to Parliament as member for that county.

In May 1725, when Forbes became Lord Advocate, Erskine was appointed Solicitor-General. On this occasion he received a special mark of royal favour. Hitherto the only Counsel allowed to be placed within the bar had been the Lord Advocate; but on this occasion a change was made. The new Solicitor-General presented to the Court a warrant under the sign-manual, subscribed by the Secretary of State for Scotland, in these terms: "Whereas we have appointed Mr. Charles Areskine, advocate, to be sole Solicitor for that part of Great Britain called Scotland, and we being pleased to show him a further mark of our royal favour, it is our will and pleasure that a seat be placed for him within the bar of your Court, where and from whence he may be at liberty to plead cases in your presence; and we do hereby direct you to cause such to be placed accordingly." At the general elections of 1727 and 1734 he was returned for Dumfriesshire. In 1737 he succeeded Forbes as Lord Advocate, and strenuously supported the Scottish policy of the Walpole Ministry till 1741. At the general election of that year Sir John Douglas of Kelhead became member for Dumfriesshire; and Lord Advocate Erskine

¹ *The Lord Advocates of Scotland*, vol. ii. p. 1.

was returned for the Sutherlandshire district of burghs. His election was, however, declared void in the following year, and he resigned office. His successor was Robert Craigie of Glendoick, to whom he wrote the following pleasant letter of congratulation: "It's commonly believed we love our heirs but not our successors, and sometimes we don't our heirs because they are to be our successors. However this is not the case with me; you have been mentioned to the King by the Marquis of Tweeddale as my successor, and I heartily agree to it, and wish you success and prosperity in the office. You are happy in having to do with a patron who is a man of truth and honour, and this is a great encouragement to you. To show I'm sincere in all this, I have used my best endeavours you should be elected in my room, the election being found void." "He returned to practice at the Bar; but there was a vacancy on the Bench in November 1744, and he received the appointment. Four years later he succeeded Fletcher of Milton as Lord Justice-Clerk; and died, after filling that post to the satisfaction of the country, in April 1763."¹ "As a lawyer," says Mr. Fraser Tytler,² "he was esteemed an able civilian. He spoke with ease and gracefulness, and in a dialect which was purer than that of most of his contemporaries: as a judge his demeanour was grave and decorous, and accompanied with a gentleness and suavity of manners that were extremely ingratiating."

2. William Kirkpatrick, 1734-35. Areskine was succeeded by his son-in-law, William Kirkpatrick, third son of Sir T. Kirkpatrick, second baronet of Closeburn. He sat in Parliament for the Dumfries Burghs from 1725 to 1747. In the latter year the Duke of Queensberry received compensation for his heritable Sheriffship, and William Kirkpatrick was appointed to the office. He died 1777. He married Jean, third daughter of his predecessor. It is thus obvious that the chair was vacated by Areskine in his son-in-law's behalf when he himself was Solicitor-General, and when that son-in-law was Sheriff of Dumfriesshire and member for the Burghs. Mr. Kirkpatrick's son took the name of Sharpe on succeeding to the Hoddam estates, and was the well-known wit and antiquarian, Charles Kirkpatrick Sharpe. William Kirkpatrick held the chair only for one year, and I grieve to say the solitary fact connected with his tenure of it that has come down to us is, that he sold it to his successor for £1000. How nobly one of his descendants is atoning for the academical shortcomings of his ancestor, I need not tell you.³

3. George Abercromby of Tullibody (1735-1759) was a country gentleman of good family. He was born in 1705, and died in 1800, within a few weeks of the completion of his 95th year. He

¹ *The Lord Advocates of Scotland*, vol. ii. p. 1 et seq.

² *Life of Lord Kames*, p. 38.

³ John Kirkpatrick, Professor of Constitutional Law and History.

was the father of General Sir Ralph Abercromby, and the grandfather of Lord Dunfermline, and he is represented by the present Lord Abercromby. Like his father, he was called to the Bar,—and they both lived to become its oldest members,—but he never practised. Of his professorial career of fifteen years we know very little. Lord Dunfermline, in his *Life of Sir Ralph*, says that “during several sessions Mr. Abercromby gave lectures in University on the Law of Nature and Nations;” and Sir Alexander Grant says that in 1741 he was lecturing on Grotius. How long he lectured we do not know. His grandson says he was “distinguished for his industry, his love of knowledge, and his vigorous and comprehensive understanding.” Notwithstanding these good qualities, however, he probably did not succeed as a lecturer. Scotch students are apt to become impatient of a professor who condescends to mere tutorial work, and, if Abercromby had nothing of his own to tell them, it is not surprising that they should have tired of his prelections on Grotius. In 1750 he made over the chair to his son-in-law, Robert Bruce; whether for a pecuniary consideration or not does not appear.

4. Robert Bruce of Kennet, 1759–1764. Of Mr. Bruce as a professor we know nothing. He held the chair for only five years, and was raised to the Bench by the title of Lord Kennet. He was great-grandfather of the present Lord Balfour of Burleigh. Whether he lectured or not I have been unable to discover, but as he is said to have had the character of being an unusually pure, painstaking, and conscientious judge, at a time when these qualities were not so common as they are now, it is scarcely probable that he held an office the duties of which he made no effort to perform. He died in 1785.

5. James Balfour of Pilrig, 1764–1769. He too was a country gentleman, and lived in the fine old castellated house, between Edinburgh and Leith, which we all know. Nor has his shadow in this respect grown less, for though his representatives have not, like those of his two immediate predecessors, reached the peerage, they have retained their position, and have recently had a large accession to their fortune. But Balfour was more than a Scotch laird; he was a Scotch philosopher; and if any Scottish Raphael should paint us a picture of the School of Modern Athens, his figure would appear in the background, behind the grander images of Stewart and Ferguson, and Hamilton and Hume. In his relations with the latter his name crops up in all the histories, and if I were dealing with the chair of Moral Philosophy, which he held from 1754 to 1764, I should have a good deal to say of him, in connection both with Hume and Lord Kames. As Professor of Moral Philosophy Sir Alexander regards him as having been simply a failure, and his removal to the chair of Public Law in order to make way for Adam Ferguson—an arrangement which was effected by one of those scandalous trans-

actions of buying and selling of which there were so many instances—must have been a prodigious gain to the University. But though “there seems little reason to doubt that Balfour was not a brilliant professor”¹ nor a brilliant man, his contemporaries spoke of him with far greater respect than the anonymous writer in the *European Magazine* in 1783, from whom Sir Alexander’s conception of his character seems to have been chiefly derived. In speaking of his criticisms of Lord Kames’s views on liberty and necessity, Mr. Fraser Tytler says: “It is with pleasure we remark that the author of *Philosophical Essays* has afforded an example of a candid, liberal, and truly philosophic spirit of inquiry.”² “Mr. Balfour was likewise the author of *A Delineation of Morality*, and a small volume, entitled *Philosophical Dissertations*. The principal object of these works is an examination of the doctrines contained in David Hume’s *Essay on Human Nature*, and his *Inquiry concerning the Principles of Morals*. The strongest testimony to the merits of Mr. Balfour is that of Mr. Hume himself.” Mr. Tytler here refers to a curious letter from Hume to Balfour, the studied urbanity of which, however, as it seems to me, only partially hides a vein of sarcasm more characteristic of the writer than complimentary to the recipient.

Balfour was no match for Hume, and his writings possess no absolute or permanent value. But whatever were his other qualities, his industry, at all events, must have been considerable, for during almost the whole of the ten years that he held the chair of Moral Philosophy, from 1755 to 1761, he also acted as Sheriff-Substitute of Edinburgh. Even so late as 1764, the year in which he was transferred to the chair of Public Law, traces of him are to be found in the Diet Books of the Sheriff’s Court.³

It is singular that the resignation of his judicial office should apparently have been coincident with his transference from the Faculty of Arts to the Faculty of Law in the University, and it is disappointing to find no proofs of his activity as a jurist, either academical or scientific. The author of the notice of him in Stephen’s *National Biography*, who is, I believe, a connection of the family, makes no mention of his having lectured on Public Law at all, though he adds two facts of some interest to what was otherwise known of him, namely, that he studied at Leyden, and that his mother was a grand-aunt of Sir William Hamilton. But not much of the genius of that great man can be claimed for him; and I fear we must be contented to sum up his character with Mr. Fraser Tytler’s statement, that he was “an ingenious, modest, and worthy man, who spent a long life in the practice of those virtues which it was the object of his writings to inculcate.”⁴

¹ Grant, vol. ii. p. 338.

² *Life and Writings of Lord Kames*, vol. i. p. 141.

³ Letter from Sheriff Rutherford, 5th October 1887.

⁴ *Life of Lord Kames*, vol. i. p. 140.

6. Allan Maconochie of Meadowbank, 1779-1796. With the possible exception of Areskine, Maconochie was the ablest man who filled the chair, and he is the only one to whom posterity gives credit for having lectured with success, even for a time. Lord Cockburn, who knew him only in later life, was estranged and bewildered by the metaphysical turn of his mind, and is a somewhat unwilling witness in his favour. He does not mention him as a professor at all, and, even as a judge, does not speak of him in terms of such enthusiastic admiration as Lord Brougham and Lord Jeffrey. Still the sketch of his intellectual character he has given us shows how exceptional must have been his qualifications for an academical appointment, and, above all, for the academical appointment which he held.

"His peculiar delight and his peculiar power," Cockburn says, "was in speculation; chiefly as applied to the theoretical history of man and of nations. He acquired great skill in the use of his metaphysical power, both as a sword and as a shield, in the intellectual contests in which it was his delight to be always engaged. He questioned everything; he demonstrated everything; his whole life was a discussion. This, though sometimes oppressive, was generally very diverting, and gave him a great facility in detecting and inventing principles, and in tracing them to their sources and to their consequences. Jeffrey described this very well when he said that while the other judges gave the tree a tug, one on this side and one on that, Meadowbank not only tore it up by the roots, but gave it a shake which dispersed the earth and exposed the whole fibres."¹

How long Maconochie taught it is difficult to determine. Bower, who is confirmed by other authorities, says he lectured only for two sessions, owing to the extensive increase of his practice at the Bar. But it seems scarcely likely that he abandoned a task which must have had great attractions for him, and for which he had taken the trouble to prepare a course of lectures on so short a trial. He knew, indeed, but too well, that he could hold the chair as a sinecure, and could thus reimburse himself for the £1532, 18s. 2d. which was the sum he paid for it to Balfour. But he can scarcely have been the man his contemporaries took him for, if, at such a period of history as the seventeen years of his tenure of the chair covered, he was willing to exchange the interests of science and of mankind for those of his clients in the Parliament House, even with the ultimate temptation of a seat on the Bench. We are told that he did not succeed in attracting a class, and this Lord Jeffrey ascribed to the unintelligible or, at all events, unteachable nature of the subject—a subject which, with all his brilliancy, I fear neither Lord Jeffrey himself nor the Commissioners to whom he addressed his observations understood. "Mr., afterwards Lord Jeffrey," says Sir Alexander Grant, told

¹ Cockburn's *Works*, vol. ii. p. 124.

the Commissioners of 1826 in reference to the chair of the Law of Nature and Nations, "It was taught by a succession of able persons in this University, among others by the late Lord Meadowbank, than whom no man was more full of discursive knowledge and originality; yet in his hands, as well as in those of his successors, it proved in practice a complete failure, so that they could hardly get through the course with a larger attendance than is now round the table of the Commissioners."¹

Had Lord Stair been in Lord Jeffrey's place he would have given a very different account of the affair. Bringing his own philosophical instincts and his acquaintance with foreign schools of learning to bear on it, he would have told the Commissioners that the conditions on which the experiment had been tried in the University of Edinburgh were not such as to render success possible. The subject, which he regarded as the very root of jurisprudence on which Carstairs designed that the Faculty of Law should be based, had never been recognised even as a branch of any organized system of legal teaching whatever. Its study was not imposed as a condition for admission to the Bar; still less, of course, to the other branches of the profession. Shallow and thoughtless wittings, led astray by Rousseau and his followers, made stupid jokes about the *jus naturale*, the meaning of which they ought to have learned from the Roman jurists whom they pretended to have studied, and the chair was openly bought and sold with the consent of the Lord Advocate and the Town Council. Maconochie thus fell on a thankless and unappreciative, though an admiring generation, and the spirit of the age, against which he was not strong enough to struggle, had probably more to do with his failure than either the intrinsic character of his subject or his own hungering after the loaves and fishes of the Parliament House. Had half the salary which he received as a judge been offered to him as a professor, had he been consulted by Government on questions of International Law, or occasionally employed as a jural assessor in the negotiation of a treaty, as is the custom on the Continent, and had the ultimate prospect of such honours as are now conferred on physicians and physicists and philanthropists been held out to him, he might have remained in the University all his days, and left a name in Scientific Jurisprudence as cherished in Scotland as that of Stair himself, and far more widely known. But let us not dwell regretfully on might-have-beens that were not to be. By preventing as a judge the candle of principle from being hid under the bushel of precedent in the Parliament House, Maconochie did good service in his day, and his judgments still enjoy professional consideration. But as a teacher of science, all that remains of him is the following sketch of his course in Hugo Arnot's *History of Edinburgh* :—

"Mr. Maconochie destined his course for gentlemen who have

¹ Grant, vol. ii. p. 316.

nearly completed their education at the University on the most liberal plan. He traces the rise of political institutions from the natural characters and situation of the human species; follows their progress through the rude periods of society; and treats of their history and merits as exhibited in the principal nations of ancient and modern times, which he examines separately, classing them according to those general causes to which he attributes the principal varieties in the forms, genius, and revolutions of governments. In this manner he endeavours to construct the science of the spirit of laws on a connected view of what may be called the natural history of man as a political agent; and he accordingly concludes his course with treating of the general principles of municipal law, political economy, and the law of nations."¹

We may here, I think, find traces of Montesquieu, and, apart from the influence which his frequent residences in France must have had upon him, it is not wonderful that Montesquieu's teaching should have been supplanting that of Grotius in his mind, when we consider that Europe had just been flooded with twenty-two editions of the *Esprit des Loix* in eighteen months after its publication. The lectures, I believe, are in the possession of the Meadowbank family, and it seems worthy of consideration whether they ought not still to be given to the world. Their intrinsic value may have been lessened by time, but they could scarcely fail to be important contributions to the history of opinion. Like the other celebrities of his time, Maconochie appears in Kay's Portraits. His physiognomy is grave and thoughtful, and one can well imagine must have been felt as somewhat "oppressive" by so gay a spirit as Cockburn's. Kay has also a pretty elaborate notice of him; and it is interesting to us to know that he was one of the founders of the Speculative Society, to which many of us owe so much. On being raised to the Bench he took the title of his estate, as is the custom in Scotland, and was the first Lord Meadowbank, his son Alexander, in accordance with the well-known jest, having been Lord Meadowbank "also, but not like-wise."

7. Robert Hamilton, 1796-1832. Though Lord Jeffrey spoke of Maconochie's successors, he can scarcely be said to have had a successor at all; for Mr. Hamilton neither taught, nor, apparently, was expected to teach. The Bishop's teinds, on which the chair depended for its endowment, having been mostly carried off by augmentations to the stipends of the ministers in the parishes on which they were allocated, an annuity of £200 a year was granted him from the Consolidated Fund. But this did not bring the salary up to its original value, and Hamilton was permitted to hold the chair as an acknowledged sinecure for the rest of his days. On his death in 1832 no new appointment was made, and thus the chair from which it was intended that the Faculty of Law should take its tone, and by means of which it was expected

¹ Arnot's *Edinburgh*, p. 305.

that it would assert its place in the scientific world, was consigned for the next thirty years to the lumber-room of the University. There is no reason to suppose that where Maconochie failed Hamilton could have succeeded; but under more favourable conditions, success, even in his case, does not seem to have been impossible. He is said to have been a considerable antiquarian, and, along with his friend Sir Walter Scott, was one of the principal Clerks of Session. I believe he was a Hamilton of Gilbertscleugh, and was connected with the Bellhaven family.

Such, then, is a brief and imperfect sketch of the fortunes of the chair of Public Law, and of the characters of its occupants. They were all men of ability, who succeeded in other and, to them, more tempting careers. Three of them, as we have seen, became judges of the Court of Session, and one of these rose to the dignity of Lord Justice-Clerk. Two, if not more, were members of Parliament. They were all cultivated gentlemen, two having had the special qualification of having previously been Professors of Moral Philosophy. Lastly,—what was an element of success of greater value in their day than in ours,—they were all men of family, and two of them are now represented by peers.

Strange as was the method of their appointment, moreover, there was not one bad appointment amongst the whole of them. There was not one of them who, under other conditions, might not have made a creditable professor, and there were two of them who, had they persevered, there is every reason to believe would have distinguished themselves as philosophical and international jurists. But they did not persevere, no one persevered, no one succeeded, and the consequence was that when I was appointed, in 1862, I had neither precedents nor traditions to guide me.

THE HOUSE OF LORDS.

DURING the last month the House of Lords has been the subject of discussion in both Houses of Parliament. In the House of Commons the proposal was to abolish the hereditary principle, and substitute a House composed of life peers. In the House of Lords the proposal was to refer to a Committee the subject of devising improvements or reforms for the House. Neither motion was carried, and so the subject, legislatively speaking, is at an end for this session; but as it is of very great interest, discussion upon it need not cease. The House of Lords is, perhaps, the most ancient legislative body that exists; and it is strong in the traditions of the past. But even in the opinion of its members and best friends it stands in need of reform. It has too much the appearance of a body hostile and opposed to the schemes generally advocated in

the country. And though it is the duty of a Second Chamber to oppose rash legislation, yet the opinion has got abroad that the Lords oppose the measures that come up to them from the Commons, not because they are rash, but because they are determined, as far as possible, to prevent measures to which they object from passing; and this irrespective of whether these measures have the support of the country or not. This is a dangerous position to take, especially in view of the fact that the House of Lords is not the powerful body it once was. It is, in fact, charged with holding the same opinions as it did when it had the power to give effect to them and defy all opposition.

It would be a curious and interesting subject to describe the relative amount of power possessed by the two Houses at different periods. But such an inquiry would lead us too far back into history, and, besides, their present relative position has long been settled. It is all very well for constitutional lawyers to state that the two Houses have equal power by the Constitution, and that a Bill requires the assent of both Houses before it becomes law. Every one knows that if this is any more than technically true, it is true in a very limited sense. It is well known, for instance,—and this is even taken notice of by Constitutionalists,—that no Government resigns on account of a vote of censure passed by the House of Lords. On the other hand, every Government owes its existence to the House of Commons, and its continued existence depends on the will of the majority of that body. And while power is leaving the Lords, it is becoming, not more and more like the Commons, but more and more unlike the Commons. Prior to the first Reform Bill, when the House of Lords was very powerful, the House of Commons and it were much more alike than they are now. One reason of this is easily understood, viz. that through their influence over the constituencies, and patronage of rotten boroughs, they appointed nearly one-half of the members of the House of Commons. Now, both their influence over elections and general power, if not entirely gone, is at least immensely reduced. And the fear is, that unless it be reformed in some way or other, its power will entirely go, and its usefulness will entirely cease. Now, any reform of the House of Lords that is not a revolution must be one that is embodied in an Act of Parliament—that is, it must be one that will satisfy the majority in both Houses. It is therefore, constitutionally speaking, idle to discuss whether a Second Chamber is necessary or desirable. This ought to be borne in mind by all who talk so glibly about abolishing it, as if this could be done by a resolution of the House of Commons. Laws passed without its consent would be of no effect; and a Bill to abolish it, and create another body in its place, could never become an Act of Parliament unless it also received the assent of their House. Unless they assent to be reformed or abolished, nothing short of a revolution can effect it. Still, as the subject admits of

argument, and as so much can be said in favour of a Second Chamber, a discussion upon it is really of assistance in considering what reforms can be made in the constitution of the House of Lords.

The first argument is, that all nations constitutionally governed have two Chambers. Not only so, but nations that have had revolutions, when these have ceased, have retained or created a Second Chamber. France is an example of such a nation, and no one can say that it is their love for antiquity that has induced the French to make provision for a Senate in the Constitution that was formed after the fall of the Second Empire. The United States of America is another, and probably the best example. The Senate there is the most powerful Second Chamber that exists anywhere. No doubt the Federal form of their Constitution makes this so. The Senate represents the different States; the House of Representatives the people of the United States; and the former is as powerful as the latter, and is based on as secure a foundation. In the next place, the use of a Second Chamber is to check impulsive legislation. There is no doubt it has this effect; and it performs this duty, well or ill, according as it is powerful or weak. Thus, if there were no House of Lords, a great many Bills would become law which at present fail to pass through the House of Lords; unless, indeed, the knowledge that their votes made laws, made the members of the House of Commons more wary of passing such measures. It has even been urged by those who desire a Single Chamber Legislature, that the fact that votes made laws would make members more careful in giving them. They object to the attitude so often taken up in the House of Commons by members: that they may safely vote for small, popular, or crotchety measures, and so please their constituents, in the full belief that the House of Lords will reject them. Most people will, however, be of opinion that a popular Assembly would still have to pass such measures, or would not have the courage to refuse to pass them; and the fact that they are really disposed of elsewhere leaves it more time to attend to its really important functions. These two reasons, taken along with the fact that most great writers on the subject, and statesmen, approve of a Senate, will be accepted as a sufficient argument that it is advisable to have one. This being so, it seems manifestly better to reform what exists than to abolish the present and create a brand new Chamber in its place. No doubt the hereditary principle seems an anachronism; but a body of life peers nominated by the Government would not be a strong body. It is doubtful if they would be as efficient as the present House. The hereditary principle also can coexist along with elective principle, and it therefore seems prudent to retain it. At least it seems prudent to try and reform the House, and yet retain the hereditary principle as its leading characteristic; and when the proposed

reform had been found to be a failure, it will be time to condemn the hereditary principle. Now the objections to the present constitution of the House of Lords, apart from objections to its existence altogether, really resolve themselves into one, though they may conveniently be considered as two in number. The first is, that it is too large, and therefore public opinion does not affect it; and the other is, that it is not in harmony with the modern democracy. These objections really mean that a large hereditary body is not, and is not likely ever to be, in sympathy with the extreme party in modern politics. There are at present about 550 peers, but the number of peers who regularly attend Parliament, and take an active interest in politics, is certainly not more than 200. And it seems too clear for argument to dispute, that if the House of Lords were exclusively composed of its active members, it would be more in touch with ordinary political opinions. It might still be as conservative, but it would be more in touch with politics, and more weight would be attached to its opinion. It would thus be an advantage to make it smaller. How might this be done? One way would be to alter the age at which a peer might take his seat. It is at present twenty-one—say, it were raised to thirty-five (the age fixed by the United States Constitution for candidates for the office of President), and limited to, say, seventy, as the age at which peers would cease to sit, unless they made a declaration that it was their intention to remain in active public life. If this were done, there would be a considerable, though an indefinite, number deducted from its present number; and the average amount of experience would be increased in direct proportion. Another plan would be, and it might be adopted in conjunction with the former, to pass a law to declare that the lower orders of the peerage should be put in the same position as the Irish Peerage, *i.e.* with a representation of their number in the House of Lords, and the remainder eligible for election to the House of Commons. There are about 250 barons and about 60 viscounts; and if peers of these two ranks were removed, the House would be small enough. The only question would be whether the average of ability would be improved, or at least retained, and this would only be if it could be made out that ability depends on rank in the peerage.

The most radical change, however, within the body would be if the peers all ceased, as matter of right, to sit in the House of Lords; and, instead, elected a certain number of themselves to sit there. If this plan were seriously proposed, great care would need to be taken that each political party were adequately represented, or at least that the Liberal party was. Care would have to be taken, also, as the Marquis of Salisbury pointed out, that it should be made desirable to enter the House of Lords: that it was not composed of peers who could not obtain entrance into the

House of Commons,—for the peers not elected ought to be eligible for the House of Commons. It would, of course, be worse than the present state of affairs if all the really able peers sought election in the House of Commons, and the House of Lords was filled with peers of only second-rate ability. Any of these three plans would reduce the number of the House of Lords to more sizeable proportions, but it is to be feared they would not reform it enough in other directions. No doubt there is great danger in attempting to reform such a body as our Upper House. There is great force in what was recently said by the Prime Minister, that if a very active body, composed of men all in public life, were formed, it might be very apt to quarrel with the House of Commons. It would be apt to object to the present distribution of power, a deadlock might ensue, and then the Upper House might disappear, or its power might be taken from it. At present the majority of peers take what is not inaptly called a good-natured interest in politics, and however useless such a body may be supposed to be, it is not so likely, except when it is strongly moved for some class interest, to quarrel with the House of Commons. And many measures, which keen partisans could not be made to submit to, are passed and submitted to, with more or less dignity, by the easy-going majority. Now, as things at present are managed, Bills do pass through the House of Lords. On the other hand, any delegated number of them would be keener, and yet would not be any more open to popular influence. The question therefore arises, Could not an Upper House be formed out of the present peerage on which popular influence could be brought to bear? Many people, no doubt, consider that such a question can only be answered by those who are prepared to square a circle or perform some impossible feat. But in the affairs of life people are not altogether unreasonable, and peers, after all, are men, and it does seem that an Upper House on which popular influences could be brought to bear could be formed if it were elected by a popular body. This was the object that the Earl of Rosebery had in view in his motion for the appointment of a committee to inquire into the subject of the Reform of the House of Lords. There would be no difficulty in finding a suitable body to elect the peers. There are several such in existence. And far above all others in power and dignity is the House of Commons. Why should not it, at the beginning of each Parliament, elect from among the peerage a certain number to form the Upper House? It could not then quarrel with its own selected peers. Besides the House of Commons there are Town Councils and the County Boards about to be formed. They also might elect one or more peers, if it were desired, as some do, to give these bodies direct representation in the House of Lords. The peers themselves ought also, as the Scotch and Irish peers do, to elect a certain number of themselves. Such a plan ought to work well, at least it looks well on paper,

provided that the peers not elected were eligible for the House of Commons, and that the representation of minorities and conflicting interests were properly and adequately safeguarded. Such a plan would please the people, for they would be able to elect the peers they trusted and respected, and they would elect peers whose opinions agreed with theirs. It should also satisfy the peerage. As many as desired to take part in public life would be able to do so, and many of them would be able to enter the House of Commons. As for the others, their dignity would not be impaired, for they alone would possess the high rank necessary for election to the House of Lords, and they would be able to pursue their present occupations without being open to the taunt that they were neglecting the duties incident to their high rank. There is, besides, another suggestion to be made. If the House of Commons is to be charged with the duty of electing a certain number from a certain class to form at least a part of the Upper House, why should the class from which the selection is to be made be confined to the peers? The House of Commons would not, of course, be interested in so restricting its choice; and, on the other hand, there are considerations which might have weight, even with peers, and induce them to increase the number of eligible men. As long as the peers remained the sole body from which members of the Upper House could be elected, the tendency would be to increase their number, and the result would be a great decrease in their dignity. On the other hand, no one would propose to close the peerage as the Scotch peerage is. And the choice therefore lies between limiting the Crown's right to create peers and allowing certain eminent men to be ranked along with them.

Now the Privy Council is a body that is peculiarly fitted to be ranged alongside the peers. Their dignity is nearly as great; and as many of them are peers, they may be considered as of the same class. If this were done, the advantage to the peers would be, that there would be no temptation on the part of the Crown to increase their number unduly; and the advantage to the country would be, that they would get the services of talented men who were not peers. The result of this plan would be that the House of Lords would be elected in part by the House of Commons and in part by the peerage—from the peerage and the privy councillors.

The period for which a House of Lords was elected, whether for each Parliament or for a period of years, would have to be fixed. It would have also to be decided whether a peer who had sat in the House of Lords could thereafter be elected for the House of Commons. But these matters, though of great importance, are distinctly matters of detail.

Such a House of Lords as we have described would be more efficient and more popular. It would still be in name and fact the House of Lords, for it would contain the hereditary peers. It would be reformed, and not revolutionized.

There is another addition to the House of Lords we would like to see made, and that is to allow the Agents-General of the great colonies to sit in it. They could not sit in the House of Commons without election, but they could be summoned to the House of Lords; and it does seem very advisable that the colonies should have a direct mode of influencing the policy of this country. The House of Lords would have its dignity increased, as it would then be, in a new sense, an Imperial Chamber. Different considerations would of course be urged in favour of this change from what are urged in favour of the general question of the reform of the House of Lords, and is really quite a different question; but still it could only be brought about in a reformed House. As to the Crown's rights, they would remain as at present as regards the creation of peers, and power would be specially reserved to it to summon to the House of Lords any peer who was a member of the Government; and the life peers who administer the appellate jurisdiction of the House of Lords would remain as at present.

In this article we have dealt exclusively with the question of the reform of the House of Lords as a legislative assembly. There has been no attempt to discuss the details of any measure passed to effect it. That the details of the subject would be very complicated goes without saying; and no reform could be made that would not touch something of great historical interest. Our ancient peerage might be affected, but it would not need to be abolished; yet, when the House is reformed, it is to be hoped that attention will be fixed much more on creating an efficient Upper House than in preserving ancient and venerable but, politically speaking, valueless rights that are possessed by certain branches of the aristocracy. The principle of the Scotch peers electing a certain number of themselves to represent them in Parliament is good, but their way of doing so is bad, as there is no means taken to represent the minority, who are altogether debarred from public life, as they are not eligible for the House of Commons. Their mode of election ought therefore to be altered, but otherwise this body may retain its present position and privileges, provided always this is compatible with the interests of the reformed House. There is no reason, again, to suppose that the position of the Lords spiritual would be prejudicially affected by the proposed reform—they would still sit. In conclusion, as was said by the Earl of Rosebery, the present is, for two reasons, a peculiarly appropriate time for making this reform. In the first place, the Conservatives are in power, and therefore the majorities in the two Houses belong to the same political party, or at least, to guard against being inaccurate, they support the same Government; and as most people admit that a reform should be made, the present is the time to make it, because a Bill that passed the Lords would pass the Commons. The other reason is, that at present there is no agitation on the subject, and the Lords could reform themselves without having

their motives misconstrued. This favourable state of matters cannot last for ever. There is a feeling abroad that something must be done. It is quiet at present, but it may become active. It will become active when the Lords reject a popular measure. It is therefore much better that the Lords should reform themselves when there are no demonstrations against them—such as were a few years ago—and when the matter can be gone about quietly, rather than wait for the time when any reform that is proposed will be met by the cry that no reform is possible; for just as the Commons could not abolish the Lords, neither can the Lords reform themselves without the consent of the Commons. They ought also to take comfort in the thought that they are not effete, but in a state fit to be reformed, for they need not despair of continuing in existence until their friends consider them too fragile to be touched.

COMMERCE AND CONTRACTS.

BY PROFESSOR DIODATO LIOY, UNIVERSITY OF NAPLES.

(Continued from page 144.)

II.

HITHERTO we have used the word *Commerce* in its widest juridical signification. But it is also employed in a more limited acceptation, to indicate the relations which arise from the Exchange of present or future values,—relations which constitute the object of Commercial Law, properly so called. Such Exchange forms the habitual occupation of certain individuals who buy in order to sell again, and it requires to be regulated in a special manner. The positive laws following the guidance of reason, have modified in behoof of these persons the rules of certain contracts, such as Sale, Location, Mandate, Security, and Association; and they have created certain special contracts in this connection, such as the Letter of Exchange, Bottomry, and Maritime Insurance. Commercial Sale is distinguished by the speciality that it can be carried out in regard to a thing of which the seller is not the owner, and that the purchaser can obtain compensation at the expense of the seller when he is not punctual in the execution of delivery. The hire of work in the matter of Commercial Contracts is called Commission, and has special rights and duties, as when it is applicable to transports. Mandate is often transformed into a contract of commission, and the commissioner does not bind the committer, but only himself, towards third parties. Commercial guarantee necessarily requires a written act after it amounts to a certain sum; and the permission of the judge is required for the sale, which has to be carried out by public auction, except in the case

of Banks authorized by their statutes to receive deposits and to give advances. The subject may not remain after valuation in the power of the creditor, as is the case with the civil pledge.

The contract of association or society in Commercial Law has undergone the greatest modifications. In the Civil Law, certain persons associated themselves together without a bond of copartnery, for a particular matter of business,—mostly in relations of patrimony,—and third parties were obliged to call them severally before their competent tribunal. In Commercial Law, on the contrary, such persons are bound altogether (*conjunctim*) and for all their goods in such a way that they form a juridical being with a fixed domicile, and the act constituting its existence is to be drawn up in writing, and accompanied with all the guarantees of publicity. This species of association is called by a collective name, and we find some examples of it in ancient times, especially at Rome, where they were formed for military supplies and for the collection of the taxes, with a capital divided into shares which were transferred by public or private acts. There is a second kind of association, in which some of the members are held responsible to third parties with all their substance, while others are bound only for the capital they have invested; the former being called *Commanditante*, and the latter *Commanditari*. Troplong sees the origin of this kind of association in the contract of *Cheptel* (in cattle), of which an example is already found in the last period of the Empire. It was, however, in the tenth and eleventh centuries, and through the operations of Italian merchants, that this mode of association assumed its commercial form. The prejudices against interest on money, and the dread of staining the nobility of their house by appearing as merchants, induced many to adopt this plan of association. The latest kind of such association was the Anonymous Company, which is a simple association of capital. The credit transactions of the association are only binding on the acting administrators of it; but its formation, as well as the regulation of the shares, is subject to the approval of the civil tribunal as a matter of voluntary jurisdiction. The Association or Company with a limited liability has been introduced in England and France under the form of the anonymous association, and it does not require the approval of the Government. A last form of such associations is that which is called the "Society with variable capital." Its statutes make entrance or withdrawal free to members, but under the condition that the common capital must not be altered by more than a tenth of the whole. It has received legal existence in France and in Belgium.

In 1844 certain weavers of Rochdale—afterwards called the *Equitable Pioneers*—entered into combination, in order to obtain the means of living at a cheaper rate. Their plan was to purchase sugar and tea in bulk, in order to sell them retail to themselves and others at the current prices, then dividing the profits among

all the members of the association at the end of the year. The same principle was likewise applied to production, by giving the workmen an interest in the success of an undertaking, from a certain part of their wages being invested in shares. Germany made a happy application of the co-operative principle to credit by means of Advance Societies (*Vorschuss-vereine*). They soon became People's Banks (*Volksbanken*), the founder of which was Schulze-Delitsch, in 1851. He united industrious operatives into societies, so that by paying a trifling sum at entry, and with a small monthly contribution, they accumulated reserve funds. The society then borrowed money at interest under the collective guarantee of all its members, and distributed it among those who applied for it. In this way every industrious operative who obtained admission into one of these societies was sure to find the sum which he required to carry on his little industry.

The new Italian Code of 1882 allows every kind of society or association to take the co-operative form. But, in order to render these associations accessible to all, it is enacted that the share shall not exceed one hundred francs. To hinder any one who has subscribed for a large number of shares from imposing his own will upon the other members, the Code interdicts the holding of shares to more than five thousand francs, and it prescribes that in the meeting of shareholders a vote shall be given to every person without taking account of the number of shares held. Finally, in order to avoid speculations on 'Change, it is laid down that the shares shall be nominated, and that it shall not be allowable to cede them without the consent of the council of managers or the meeting of shareholders, according to the conditions provided in the statute. The voluntary withdrawal of members is permitted, but they remain bound to third parties for a period of two years for the operations current, and up to the amount of the shares held.

We come now to Contracts of a purely Commercial origin, namely, the Bill of Exchange and Maritime Exchange or Bottomry. In Athens the idea was already formed of a Bill payable to order, and the Letter of Exchange was not entirely unknown. In a harangue of Isocrates against Pasion, we find that a certain Stratocles, when about to set out for Pontus, preferred to leave a sum with a young man of that country then residing in Athens, receiving a letter to his father that he should pay him it in Pontus, and the banker Pasion guaranteed the contract. Cicero, writing to Atticus, asked him if he should convey a sum to his son in Athens by way of exchange or in kind. In ancient times, transference by endorsement was unknown, so that it is rightly held that the Bill of Exchange was invented in the Middle Ages, and probably by the Jews. The German Law of Exchange does not recognise any difference in the legal effects of a Bill of Exchange and of a Note payable to order, regarding them both as by their

nature acts of commerce. This principle is adopted in the new Commercial Code of the kingdom of Italy of 1882. The Letter or Bill of Exchange is defined as a commercial obligation to make payment at a definite place and time of a sum to the order, mediate or immediate, of the possessor of this obligation. On the other hand, the Note payable to order is an obligation to pay at a determinate time a certain sum to the legitimate possessor of the claim. Both are transferred by endorsement.

Transactions in Bottomry or Maritime Exchange (*fœnus nauticum*) were known to the Romans, and Cato was able to make large profits by them. In the Contract of Bottomry, the debtor is discharged from repaying the capital and interest if the ship perishes in the course of the voyage. On the contrary, if fortune favours it, he has to restore the sum borrowed and "nautical interest," which is much higher than the ordinary rate. After the invention of the compass and of navigation by steam, the dangers at sea were greatly diminished, and this contract began to fall into disuse.

The last of the Commercial Contracts is that of Marine Insurance, which consists in undertaking the risks that may be run by the vessel and its cargo during the voyage. By paying a small premium, security is given against all accidents at sea. Marine Insurance has served as a type to all other kinds of insurance.

The merchant is favoured by special privileges in regard to the means of proof at law. He is entitled to establish his proof by the commercial books in which all his obligations ought to be entered, and these are valid against him as evidence, and may be used as valid evidence against third persons, provided they are merchants having transactions with him; he can also establish his proof by the books of public officers regularly kept; and finally, by the oral testimony of witnesses, without limit as to the amount, whenever the judicial authority believes it convenient. By making a declaration of his bankruptcy (which, however, must neither be fraudulent nor culpable), a merchant will be released from all obligations to his creditors. Moreover, a majority of the creditors, who represent three-fourths of the claims, by drawing up an agreement, are able to compel opposing creditors to accept it, and to avert the bankruptcy. A special jurisdiction, with adequate knowledge of the commercial usages, will have to decide all differences that may arise.

It may be asked, What have the other branches of human activity done for commerce?—Even from the most remote times religion came to the aid of commerce. Commerce took its start in the wallet of the pilgrim and on the back of the camel. The most celebrated temples of antiquity, of which some were founded in the oasis of the desert, and were places of rest and refreshment for the caravans, became the centres of the greatest markets. In Africa,

such were the temple of Jupiter Ammon, and of Meroë and Assum in Abyssinia; and in Asia there were Mecca in Arabia, Palmyra in Syria, and Pataliputra (the *Palibothra* of Megasthenes, now *Patna*) in India.

Commerce was carried on by land, and with much difficulty, so that only goods of great value could be transported, such as the precious metals, pearls, perfumes from natural products, and byssus (the finest tissue of Indian cotton), the superfine woollen tissues of Thibet, some of the silks of China, and of the works in ivory from India.

By degrees the commerce of the coasts sprang up, and it stretched from the Arabian Sea, touching the Persian Gulf and on to India, and perhaps to China. In the Mediterranean Sea, the Phœnicians, who came, according to Herodotus, from the Red Sea, occupied the coasts of Asia and of Africa, and, advancing by the columns of Hercules, spread themselves over the shores of Spain. They found rivals in the Greeks, who covered with their colonies the Euxine Sea, the Palus Mœotis, and Magna Græcia, founded Cyrene in Africa, Maseilles in Gaul, and lastly Alexandria, the greatest emporium of antiquity. With the development of maritime commerce there were transported, not only objects of luxury, but also commodities, and especially corn. The Romans were not a commercial people, but their highways, their harbours, and their maintenance of so many different nations in unity, indirectly aided the progress of commerce.

The Arabs may be called the successors of the Romans, if regard is given to the extent of the empire of the Caliphs, which stretched from the Tagus to the Indus. Europe groaned under the barbarian invaders, but by degrees the ancient Roman cities rose again, first in Italy, then in Germany along the Rhine, and others were founded in Flanders and on the Baltic, which were bound in league among themselves. This great movement had been aided by the Crusades, which poured the West upon the East, erected a Latin empire at Constantinople which lasted fifty-four years, and a kingdom at Jerusalem which lasted eighty-six years. The North carried into Italy its products in wool, hemp, flax, and building timber, in order to exchange them for the products of the East. Silk was raised by means of the few silkworms which two monks brought in their staves to Justinian; and the cultivation of it spread into Greece, Italy, and France. Navigation was rendered more secure by the use of the compass and the astrolabe.

The course of commerce was disturbed by the founding of the Ottoman Empire in the thirteenth century, and more than ever by the conquest of Constantinople and of Egypt. Then was the need felt to find a new way to India and China. The Portuguese succeeded in finding it by sailing round Africa, and discovering the passage of the Cape of Good Hope, and they made Lisbon the

emporium of the Eastern commerce. Voyages of discovery were then multiplied, and Christopher Columbus, going in search of the Indies by the western ocean, found a new world. Science likewise came to the aid of commerce. Doria taught how to take advantage even of contrary winds; and Galileo having discovered the satellites of Jupiter by means of observations on their eclipses, showed the way to determine the latitude of any particular place. Railways and the electric telegraph have now turned the whole earth into a single market-place.

Art did not advance commerce, but it was greatly aided by commerce. The Medicis at Florence co-operated by their riches in creating many masterpieces; and the Flemish and Dutch schools were really born in the bosom of trade.

Industry thus furnishes the material of commerce, and if its first development took place in the East, this arose from the fact that production, both natural and artificial, had its cradle in that favoured land of the sun. And now that iron and coal play the principal part in industrial production, commerce shows its predilection for the North.

In ancient times the State did not show itself in any way particularly favourable to commerce any more than to industry; but neither did it oppress it with special burdens, as it has been shown superabundantly that customs' tariffs were then mere fiscal imposts. The errors of the mercantile system, which made wealth consist principally in the precious metals, generated the prohibitive system; and thereafter the colonial system, which, instead of aiding commerce, injured it, as it did not supply the consumers with all that they desired. Men came to understand that wealth consisted in all kinds of products and was born of labour; yet prohibition did not therefore cease, but was transformed into protection. It is only since the first quarter of the present century that the State has restricted itself to its mission of guardianship in relation to commerce, and has been gradually reducing the custom tariffs to simple fiscal dues.

THE TRIAL OF DR. MIDDLETON.

ON the 7th of April last, Dr. Gowing Middleton, an English doctor, was placed upon his trial for homicide before the criminal Court at Cordova. The charge against him was that of having feloniously caused the death of Heredia, an Andalusian gipsy, in the cathedral tower at Cordova. The story of the gipsy's death was an extraordinary one. It appeared that he had pressed himself upon Dr. Middleton as a guide. At first his services were declined, but subsequently the doctor agreed to allow the gipsy to be his cicerone to the cathedral tower. Half-way up the tower

there is a door in the staircase, which the gipsy opened; and having no further need of him, the doctor told him that he need come no farther, and that on his return he would give him a franc for his trouble. On reaching the summit the doctor turned round, and found to his surprise that the gipsy had followed him, and that there was a most murderous expression on his face. Fearing the worst, the doctor made a bolt for the stair to descend; the gipsy sprang forward to intercept him; but the doctor beat him back with his stick. After a struggle, however, the gipsy gained possession of the stick, and drew a dagger. But he hesitated to stab, doubtless afraid that a knife wound would tell its tale; and, taking advantage of this, the doctor made a bolt and gained the stair. The gipsy, however, was not to be denied, and, ere the doctor had descended a couple of steps, he was on him again, and, seizing him round the body, he rifled his pockets of silver money. Fortunately the doctor carried a revolver, and, drawing this from his pocket, he fired it twice over his left shoulder (he was left-handed). In an instant the assailant's grasp was relaxed. The doctor hurried down and gave the alarm, and the authorities, on ascending the tower, found the gipsy lying quite dead upon the fourteenth or fifteenth step from the summit, shot through the heart, and slightly wounded by the graze of a bullet at the mouth. It was a providential escape, for there can be no doubt that the intention of the gipsy, who was a very powerful man, was to rob the doctor, and then to cover his crime by hurling his victim from the top of the tower to certain death upon the pavement below. Such was the fate which presumably befell a young Englishman a year or two ago, whom the same gipsy escorted up the tower, and whose mangled remains were found below, the gipsy representing that he had committed suicide. Apart altogether from this suspicion, however, the gipsy Heredia was a man of the most disreputable character.

Now, were such an incident as this to happen in this country, it is improbable that the man-slayer would be placed upon his trial. If a man of good standing and character were to come frankly into a police office and tell that he had been set upon by a footpad and had fired at his assailant, and if subsequently the dead body of a notorious robber were found near the spot, a prosecution would not be dreamt of. But it appears not to be so in Spain; and Dr. Middleton, who had fortunately been released on bail, and spared that mystery of iniquity, a Spanish prison, was placed upon his trial, not, indeed, upon the capital charge, but upon one equivalent to our culpable homicide, or to the English manslaughter. Trial by jury is unknown in Spain, and the trial of Dr. Middleton was conducted before a presiding judge and two magistrates. Great precautions had to be taken to secure the safety of the accused against the wrath of the gipsies,—a fierce and vagrant but extremely clannish race, who differ entirely from their Spanish

fellow-countrymen. A number of these swarmed in and near the court-room. It was necessary, therefore, to have armed guards constantly in attendance to stand between Dr. Middleton and the mob. So fierce and threatening, indeed, became the attitude of some of the relatives of Heredia in the course of the proceedings, that it was necessary to beat them back by force from that portion of the hall where the doctor was sitting. In this country such risks as those to which Dr. Middleton was exposed during the trial could hardly be incurred. Not only is deliberate assassination almost unknown, but if any such attempt were feared, the precautions against it would be overwhelming, not, as apparently in this case, only barely sufficient.

The order of procedure in court was widely different from that which here prevails. Three parties were represented at the trial—the Crown, the relatives of the deceased, and the accused. The first business was the formal reading over of the charge. Next followed the reading of papers put in by the counsel for the several parties to the cause. The counsel for the Crown asked for a punishment of two years four months and one day's imprisonment, an indemnity of 1500 pesetas for the gipsy's family, and payment of all the costs and charges of the trial. The counsel for the gipsies demanded a penalty of fourteen years eight months and one day's imprisonment, and an indemnity of 3000 pesetas. The counsel for the accused, of course, demanded his unqualified acquittal. As in most continental trials, the proceedings began with a call upon the accused to tell his story of what had happened. On the conclusion of the doctor's narrative he was cross-examined, both by the counsel for the Crown and counsel for the prisoner. In the course of the latter cross-examination certain indelicate suggestions were made, with the result that the Court ordered the hall to be cleared. Shortly afterwards, however, the public were readmitted. Beyond the evidence of the doctor there was but little testimony to adduce. The finding of the body was proved, and medical men deponed to the cause of death being a bullet wound in the left ventricle of the heart. In the course of the proceedings an adjournment was made to the cathedral tower, and Dr. Middleton was required to point out the spots at which the different incidents occurred. From the line of examination taken by the counsel for the gipsies, it appeared that there were three points which were to be pressed against Dr. Middleton. 1. That the gipsy had five franc pieces in his possession when he ascended the tower, and was not therefore likely to do such a desperate act as that suggested. This, too, might have accounted for two five franc pieces having been found in his hands. On this point, however, the evidence of the gipsies failed. It was true that four five franc pieces were found upon the body of the deceased after its removal to the cemetery, but previously the body had been carefully searched by the authorities and no money found upon it.

It was clear, therefore, that these five franc pieces, afterwards found in the pockets, had been put there by the gipsy's friends to set off the case against the doctor. 2. That the wounds could not have been caused by bullets fired by a man over his shoulder, but must have been occasioned by the shots of a man facing his antagonist. But the medical evidence failed entirely to bear out this objection. 3. That the doctor's story was manifestly false, because the body was found a dozen steps below the scene of the scuffle. But here again medical evidence supported the doctor, for it was to the effect that a man shot in the ventricle of the heart might take several paces before he fell. This very point came up recently in a murder trial in Glasgow, where it was clearly made out that a man had walked some fifty paces after being stabbed in the heart.

The speeches were taken upon the second day of the trial, Monday the 9th of April. Counsel for the Crown, though formally adhering to the demand for sentence, virtually asked the Court to acquit the prisoner. This is analogous to our own procedure in Board of Trade cases, where the Board always *pro forma* ask the Court to deal with the master's certificate, although their representative may admit that on the evidence he is exonerated from blame. Counsel for the gipsies made a vigorous speech in favour of a conviction, and adhered to his demand for a severe penalty. His theory was that of a quarrel as to the price to be paid for the gipsy's services; some movement of the gipsy's which excited a baseless fear in the breast of the doctor, and led him to draw his revolver and fire the fatal shots. The reasoning was hardly consequent as our ideas go, for in this country, were a man, acting under the impression that another was about to throw him over a tower 200 feet high, to shoot his supposed assailant dead, we would hardly give him fourteen years, even though it appeared that his fears were baseless.

Some little time ago, an American Court very properly laid down the rule that a man is justified in firing when under "reasonable apprehension of danger to his life." It was left to the jury—a Virginian one—to say what reasonable apprehension was, and they found in effect that when in the course of an altercation one of the disputants thrusts his hand into his coat-tail pocket, the other may be in "reasonable apprehension of danger to life," and is entitled to draw and fire, and, accordingly, in the case in question they acquitted the accused! Such a jury, even if they had fully accepted the gipsies' advocate's version of the facts, would have had no difficulty in acquitting Dr. Middleton. The peroration of the gipsies' advocate was quite worthy of an unctuous defender of accused crofters in our own courts: "He would find that in Spain poverty was no crime, as in England; that justice had no respect of persons."

Counsel for the accused delivered an exhaustive and powerful

speech in favour of his client. He carefully analysed the evidence, and showed convincingly that every probability of the case was in favour of the truth of Dr. Middleton's narrative. Even if that narrative were rejected, there was nothing but vague speculation as to what had happened, upon which a conviction could not possibly follow.

There were two remarkable features, the one in the manner of delivery, and the other in the matter, of all three speeches. As regards manner, counsel sat whilst addressing the Court; a singular arrangement amongst the most courtly and punctilious people in the world. For the matter, it was singular to what an extent racial considerations were dwelt upon by all three speakers. On the one hand, the counsel for the Crown admitted, and counsel for the prisoner contended, that the gipsies are the very offscouring of society, and that the English are a noble, truthful, upright people. On the other hand, the gipsies' advocate founded strongly upon the fact, which he elaborated and fortified by quotations, that the English are an overbearing, ill-tempered, impulsive, and revengeful race. We are generally and very justly credited with insular self-absorption and lack of the better cosmopolitan spirit: but even a London barrister would hardly dream of arguing that the general character, say, of the Spaniards, raised an almost overwhelming presumption of guilt against a Spanish sailor accused in a Liverpool stabbing case. And what a magnificent howl there would be in Parliament and the press, if the Lord Advocate were to preface his speech for the Crown in a crofter trial by a vigorous denunciation of the manners and the morals of the Celtic race!

The Court took four days to consider their judgment,—a delay which seems to suggest some difficulty where none ought to have existed, but which was perhaps attributable to a desire to diminish the chance of tumult by delivering judgment at a time when it was not expected. Dr. Middleton was handsomely acquitted, but he was significantly advised to leave Cordova at once, and warned that the authorities could not be much longer responsible for his safety if he chose to remain. It need hardly be said—he went.

We have indicated above that in this country a man in Dr. Middleton's position would probably not be put upon his trial. But be it that he is to be tried, the Spanish procedure seems certainly much more satisfactory than our own in one important particular. Of this homicide, as of most homicides, there was but one witness, and, in accordance with the practice which still prevails in our courts, that witness's mouth is shut. It is true he may make a declaration, but that is not evidence in his favour, although it may be used against him. It cannot even be read to the jury unless the prosecutor assents, and at least one judge of the High Court consistently refuses to allow it to be read where

the pursuer's counsel requests it and the prosecutor assents. Besides, no declaration can take place of a *viva voce* description, and in this very case of Dr. Middleton the accused was able to clear up many matters by pointing out particular places and exemplifying gestures. The Bill at present before Parliament will put this matter right if it passes, and thereby abolish, perhaps, the very last of the oppressive privileges which the prosecution used to possess against the accused,—privileges at one time so extensive as to justify the belief that the lawmakers shared the opinion which one or two of our judges are said still to entertain, that every man placed on his trial by the Crown is guilty of the offence of which he is charged.

Cases somewhat similar to that of Dr. Middleton are not uncommon. A. is found dead. Admittedly B. killed him, but under what circumstances none but B. can tell. Without B.'s assistance it is hard to unravel this knot. Is it murder, or culpable homicide, or justifiable homicide? In different cases all three results have been arrived at on a balance of presumptions and probabilities. There are cases, doubtless, where the exact truth can never be obtained. But be the accused guilty or innocent, and if guilty, guilty in the first degree or only in the second, the truth of the matter is much more likely to be reached by letting him tell his own story and give his own explanations, and then comparing it with the real evidence and the surrounding circumstances, than by sealing his lips, as has hitherto been our practice.

PRESUMPTION OF LIFE UNDER THE ACT OF 1881.

"WE have fortunately no rule founded on presumptions derived from the lapse of any fixed period of time," said Lord Hope in the year 1855, in reference to a case in which the absentee, who had disappeared for seventeen years, was not held to be presumably dead; "and every case which I have ever seen shows how unwise it would be to attach any such weight merely to the lapse of a certain number of years, without regard to the age and character of the party, and his condition in life, and the character of the country in which he was last resident." But the result of leaving the determination of such questions to be made according to the "presumptions, proofs, and inferences" extracted from each particular set of circumstances was, very naturally, to make the Courts tender of pronouncing a sentence of death on the absentee; and once the disposition and attitude of the Court is formed, it does not always readily adapt itself to changed conditions, such as are implied in the modern development of communication between one part of the world and another, and in the greatly extended means of investigation and inquiry which are within the reach of

all. Accordingly the Act of 1881 makes apology for its appearance by declaring that "great hardships have arisen from the want of any limitation to the presumption of life as regards persons who have been absent from Scotland, or have disappeared for long periods of years." Proposals have been made to amend this enactment, chiefly in respects where it is said to have been found wanting in the course of the practical test to which it has now for some years been subject, and the Bill of 1887 was introduced for this purpose. The following paragraphs, dealing with the cases decided under the Act since 1881, supply a summary of the results of six years' experience of the working of the Act as a practical measure.

The Act refers to the absentee as "any person who has been absent from Scotland, or who has disappeared for" certain periods therein laid down. When the Act was in its ante-natal stage of existence as a Bill, this phrase was severely criticised. It was thought to be too general, particularly as relating to moveable property; and it was variously proposed to limit the application of the Bill, in cases where moveable property was concerned, to persons domiciled in Scotland immediately prior to their leaving that country, or to persons having a Scotch domicile down to the latest ascertainable moment of their history. Both these amendments were based on the broad and substantial ground that the rule of international law which assigns the regulation of questions relating to moveable succession to the law of the ancestor's domicile, was inconsistent with the proposal to give a Scotch Court power to regulate questions of that kind in cases where the deceased either had not a Scotch domicile when he died, or even never had a Scotch domicile at all. The latter alternative was brought within possibility by the ambiguous phrase of the Bill (preserved in the Act)—"Any person who has been absent from Scotland, *or who has disappeared for*" the statutory period. This reading of the Act was considered in the well-known case of *Rainham v. Lang* (9 R. 207), in reference to a question relating to heritage in Scotland. Since the local situation of heritage gives jurisdiction to the Court *rei sitæ*, the case was a favourable one for a broad construction of the statute; but the Court held that since the missing person had never been in Scotland, the Act did not apply. Two considerations are relied on in the opinions: (1) that the title of the Act refers to "persons long absent *from Scotland*," though both the preamble and the enacting clauses use the ambiguous phrase alluded to above; and (2) that the statute deals equally with moveables as with heritage, and that the consequence of applying a wide construction of the Act to moveables would be to "give rise to embarrassment of which it is not easy to see the end." The ambiguous phrase introduced in the preamble and enacting clauses was explained to refer to the case of persons who have never left Scotland, but have disappeared without leaving any trace of their existence, while in the country, or at least have

disappeared without its being proved that they ever left the country. The Lord President sums up his views in a passage which is thus reported in the *Scottish Law Reporter*, vol. xix. p. 169 (the Session Cases report of the same passage, by the way, is wholly unintelligible):—"The case . . . does not appear to be within either the mischief or the meaning of the Act. The mischief to be remedied is the case of a person who has been in Scotland, who has disappeared from it or within it for a certain length of time, and who was at the time of his disappearance, or has since become, entitled to property in Scotland; and the meaning of the statute is exactly commensurate with the mischief to be remedied—that is to say, it comprehends only the case of one who has been absent from Scotland for a long period, although it may be doubtful whether he is in or out of Scotland."

It is clear from the reports that this decision was arrived at, in great part, by the very unsatisfactory method of considering the consequences of construing part of an Act in a certain way on the construction of other parts of the Act relating to different matters. The Bill of 1887 boldly proposed to empower the Court to deal with the succession of absent persons who "never have been resident in Scotland;" but against this the old objection was urged, viz. that it violated one of the most universally accepted rules of international law—that the *forum* of the deceased's domicile is alone entitled to distribute his moveable estate. It does not appear, however, that in future legislation there should be any difficulty in distinguishing questions of heritable from questions of moveable succession, giving the *lex rei sitæ* its due sway in the former, and limiting the application of the presumption as regards the latter to persons who, though absent, shall have been domiciled in Scotland, either at the date of their disappearance, or at the last date at which news was had of them.

Examples of the evidence which the Court will accept in support of applications under the Act will be found in Tawse and McGregor, petitioners, reported in the *Scottish Law Reporter*, vol. xix. p. 829.

The persons who may competently make application under the Act are those who are "entitled to succeed" to the missing person. The case of the *Peterhead School Board v. Yule's Trustee* establishes that a fiar, whose fee is burdened with a liferent, is not included under the category of "persons entitled to succeed" within the meaning of the Act. When a liferenter dies, the fiar does not succeed to the liferent, the fee is only disencumbered of a burden which the death of the liferenter extinguishes. The case of two successive liferenters is not covered by this decision, and probably a second liferenter, appointed to succeed on the failure of a first, would be entitled to the benefits of the Act in the case of the latter's disappearance. The result of Yule's case, however, points to a flaw in the Act, for it is hard to see any reason why the pre-

sumption of life should not apply to the case of fiars and liferenters, and accordingly the Bill of 1887 proposed, *nemine contradicente*, to admit them to the benefits of the presumption. Another class of cases which falls outside the statute is represented in the reports by the case of *Craig*, 9 R. 434, and by the recently-decided cases of *Minty v. Ellis' Trustees*, 15 R. p. 262, and *Union Bank v. Gracie*, 25 S. L. R., p. 61. In the first of these cases the absentee had been last heard of in 1851. By a brother's death in 1874 a succession opened to him (if alive) in common with other brothers and sisters. These other brothers and sisters, in 1882, applied to the Court under the Act of 1881, as persons who were entitled to succeed to the missing brother (in terms of section four); but their application was refused. Under the eighth section of the Act, if no presumption arises from the facts that the absentee died at a certain date, his death is fixed at the seventh year from the date of the last news had of him; and under the empowering sections of the Act, the only competent applicants for the benefit of the presumption are those who are "entitled to succeed to the absent person." The date of the missing brother's death is thus fixed at 1858. But the applicants could not be entitled to succeed to him if he died before 1874, the date at which the succession opened, because, in that event, he died without any right vested in him to which they could succeed. They accordingly attempted to argue that section eight was not intended in all cases to be read into section four, or, as the opinions paraphrase the argument, that while the absentee was to be held dead in 1858, to make the Act apply, he was also to be held alive in 1874, to entitle the petitioners to succeed to him. The more recent case of *Minty v. Ellis' Trustees* is to a similar effect. In it the trustees, under a trust settlement, had been empowered to pay, on the death of the widow, certain funds to son and daughter, if in their discretion they thought it advisable so to do, and at whatever time they thought best, or, if in their discretion they considered it the wiser course, to pay income only and no capital. If the son died without issue, the daughter was to succeed him in his share. The son disappeared unmarried in 1853, having got payment of no part of his share of the estate; his mother, the widow, who was then alive, died in 1865; and the daughter also died sometime after, leaving children. These children desired to make up a title to the whole estate, but found the trustees unwilling to part with the son's share in favour of the daughter's children, in the absence of proof that the son was dead. In these circumstances the children applied to the Court under the Act of 1881, but it was held that they could not be admitted to the advantages of the Act, inasmuch as the only competent applicants are those who are "entitled to succeed to the absent person." The son had disappeared in 1853 with no vested right in the estate. He had "died," in virtue of the eighth

section of the Act, in 1860 (*i.e.* seven years after the date of his disappearance), still with nothing vested in him, for his mother was still in life, receiving the income of the estate, and his rights under the testament could not vest till her death. The result, therefore, of his "death" in 1860 was not to open to the applicants, his nephews and nieces, any right of succession to him, but only a right of succession under the will of the testator. The Lord President, however, indicated an opinion that ways and means might, without much difficulty, be found of getting the estate safely transferred to the applicants. At common law it was usual either to require caution for repayment in the event of the reappearance of the departed one, or to take a bond for the like purpose; but at common law the Courts would not interfere without a much greater lapse of years than the facts disclosed in this case. Some light is thrown on the matter by another very recent precedent, *The Union Bank v. Gracie*, reported in 25 S. L. R. p. 61. The testator there left a sum in the Union Bank to a brother, and in the event of his predecease to his children. The testator died in 1883: the brother had gone abroad in 1861, and was last heard of, ill and in hospital, in South Africa, in 1872. Under the Act (§ 8), if it had been applicable to the case, the brother must have "died" in 1879; he died, therefore, before the succession opened, and nothing had thus vested in him, and his children, therefore, were not "persons entitled to succeed to the absent person." They were the testator's next of kin, however, and raised a multiplepinding with the bank, explaining how they were deprived of the advantages of the statutory presumption, and narrating the inquiries that had been made after the absentee, particularly in relation to a policy of insurance which the insurance company had paid on receiving what they considered satisfactory evidence to raise a presumption of death. The Lord Ordinary (M'Laren), without proof, pronounced an interlocutor, "for aught yet seen," ranking and preferring the children to the fund *in medio*, "subject to the declaration that in the event of a claim being hereafter successfully maintained in the name of" the person alleged to be deceased, "the claimants shall be bound to repay the sum to such person or persons as the Court may direct." This arrangement may have cut the knot of difficulty in the case, but it is perhaps too much of the rough and ready order to be frequently resorted to, and inapplicable to cases involving larger estates than that which constituted Gracie's fund *in medio*.

There can be no doubt that the statutory presumption ought to cover such cases as those last mentioned, that is to say, should be made to apply to absentees upon whose death or survivance the right to an estate depends, as well as to persons who were in right of an estate at the time they "died" or disappeared; and in this respect the scope of the Act requires enlargement. But

even if this were accomplished, the Act would still be imperfect. Take, for example, the last case referred to, *Union Bank v. Gracie*, and suppose the Act extended so as to place the case of an absentee, upon whose death or survivance the right to an estate depends, within the limits of the application of the statutory presumption, such a case might still be excluded by the operation of section eight. For, while an application for making up a title to moveables cannot be presented till the expiry of fourteen years, and a similar application in reference to heritage till the expiry of twenty years, during which the missing man has been absent or unheard of, the absentee is by section eight presumed to have died seven years after the last news of him; so that, in the case of the testator in Gracie's case, though section eight would kill him in 1879, the section empowering the application would prolong his existence till 1886. To remove this difficulty, it has been suggested that the date of the presumed death and the date at which the application can be competently presented, should be made identical (see Report by Faculty of Advocates on Bill of 1887, *antea*, vol. xxxi. p. 434).

Section eight applies only "where no presumption arises from the facts that he (the missing person) died at any definite date"—a phrase which was recently explained in the case of *Williamson*, reported in 14 R. p. 226. The petitioner there claimed the estate of a missing relative, together with the accumulations of rent and interest from the date at which the Court should hold the relative to have died, and attempted to establish a presumption in favour of death at an earlier date than that fixed by section eight, in order to increase the amount claimable under the head of accumulations. In deciding whether or not this attempt had been successful, the Court laid it down that "the presumption arising from the facts contemplated by the statute is such a presumption as would have been sufficient to overcome the presumption of life under the common law." Accordingly, it being admitted that a certain absentee must be presumed dead, the Court will not enter into a question of probabilities as to whether the date attempted to be proved or the statutory date is the more likely date of the death. In common law cases of presumption, indeed, a "definite date" is hardly ever ascertainable, but the presumption may be clear to the extent of fixing the death at a time prior to the expiry of the seventh year from the date of the last trace of the absentee's existence. The words "any definite date" are so explained in the opinions for Lords Shand and Adam, and the case of a sailor, whose ship is posted missing, is taken as an example of a disappearance which might at common law be held as establishing a presumption of death at a sufficiently definite period to entitle it to overcome that provided by statute. At common law, however, a presumption cannot in general be established at all, if there is any possibility on the facts proved

that life might still have been in existence, and the circumstances in the case quoted afford an example of how slender a possibility of life may be held, at common law, to overcome a strong probability of death.

Another stray point has been decided with reference to the power given to the Court under section one, of sequestering the estate of the absentee, and appointing a judicial factor, with power to pay over the free yearly income to the person applying for the sequestration. In the case of *Dougalls*, reported in 20 S. L. R. p. 164, where such a sequestration had been applied for, it was held that the expenses of the application could not be taken out of the capital of the estate. The reason for this is that section one gives no power to deal with anything but the income of the estate; and accordingly, although in the case in question the widow of the absentee who made the application would not get, for two or three years at least, a sufficient aliment out of the "free yearly income," after payment of the expenses of the application, the capital of the estate was preserved intact.

CIVIL PROCEDURE IN THE COURTS OF NEW YORK.

(To the Editor of the Journal of Jurisprudence.)

[WE have much pleasure in printing the following article, which, as will be seen from the subjoined letter, Mr. Goudy has been good enough to secure for us.—ED. *J. of J.*]

SIR,—Some time ago, at the request of Mr. Dudley Field, of New York, the well-known international jurist and law reformer, I wrote a short sketch of our Court of Session procedure for the information of American lawyers. This sketch was published in the *Albany Law Journal* of 9th January last. Thereafter it occurred to me that a similar sketch of the civil procedure in the Courts of New York would be interesting and instructive to the lawyers of this country, and I suggested this to Mr. Field. In response, he has kindly sent me the following paper, which has been written at his request. It is from the pen of Mr. Lilian Herbert Andrews, a distinguished member of the Junior Bar of New York.—I am, yours faithfully,

HENRY GOUDY.

CIVIL PROCEDURE IN THE COURTS OF NEW YORK.

The Civil Courts, in which is carried on the litigation of New York City, are, in the order of their rank, as follows:—1. Court of Appeals; 2. Supreme Court; 3. Superior Court of the City of New York, Court of Common Pleas for the City and County of New York; 4. City Court of New York; 5. District Courts (which are not Courts of Record).

I. DISTRICT COURTS.

These are eleven in number, scattered through various parts of the city, and correspond nearly to the Justice Courts in the country—except that a Justice of a District Court in New York city must now be a member of the Bar, and a County Justice of the Peace need not be.

The procedure is somewhat technical, depending, as does the jurisdiction, entirely on special statutes. The judgment demanded, if for a sum of money, cannot, as a rule, exceed \$250. No question can ever be litigated which involves a dispute as to the title to real property.

If the action is on contract, and more than \$100 is demanded, the defendant may offer to the Court a bond with one or more sureties, whereupon he is entitled to an order removing the case to the Court of Common Pleas. This expedient is often adopted for the purpose of delaying the trial for several months, and is often defeated by a motion on the part of the plaintiff (before the bond is actually offered) to reduce the claim to \$99.

Suit is begun by service of a summons, which must be returnable in not more than twelve or less than six days after service. On the return day issue is joined. The pleadings may be either oral or written, and, if written, are filed with the Court. If either party desires a jury, he must ask for it on the return day, and a jury of six men is specially summoned. The case is usually set down for trial on some day within a week after joinder of issue. Where the case is tried without a jury, the Justice must either decide at once or file his decision within eight days after the trial, otherwise the case is out of Court, and the parties, if they choose to litigate, must begin all over again. This privilege of not deciding the issues is a convenience to a stupid Justice as well as a dishonest one.

Within twenty days after judgment, the defeated party may appeal to the General Term of the Common Pleas; but he has little chance of reversing the judgment unless he can show some error of law in the rulings of the District Justice. The Common Pleas have power to reverse on a question of fact, but they almost invariably refuse to look into the facts, unless the judgment is a flagrant violation of the evidence.

When a Justice of this Court is a man of integrity and good sense, the Court becomes an admirable agent in the settlement of small disputes. But it cannot be denied that at times in the history of New York, dishonest and ignorant men on the Bench have made the District Court an engine of evil and oppression to the poorer classes of men who have sought their protection.

II. CITY COURT OF NEW YORK.

This Court has jurisdiction of actions where judgment is

demanded for a sum of money, or for the recovery of chattels, or the lien of a mechanic for labour and materials furnished. It will be seen that most actions which do not seek equitable relief can be prosecuted in the City Court. There are, however, detailed exceptions; and furthermore, no judgment can be demanded for a greater amount than \$2000; so that the Court must be regarded as one of limited jurisdiction.

It is composed of six judges, three of whom hold each a jury term every month in the year except July and August. Another judge sits daily in Chambers to hear motions.

Toward the end of nearly every month three of the judges sit as a General Term, for the hearing of appeals from the jury term, and from certain decisions of the judge at Chambers. From the General Term of the City Court an appeal lies to the General Term of the Common Pleas; but on this appeal it is not customary to consider anything more than the questions of law. The decision of the Common Pleas is usually final; but when a new point of law has arisen, the Common Pleas General Term may, in its discretion, allow the case to go to the Court of Appeals.

III. SUPERIOR COURT OF THE CITY OF NEW YORK, AND COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW-YORK.

These two, together with certain other Courts in other cities, are known as the "Superior City Courts."

Their jurisdiction is defined by statutes, but there are so few suits which cannot be brought in them that jurisdiction is generally presumed unless it is shown not to exist. The Common Pleas corresponded originally in some measure to the County Court in the other counties of the State, but its jurisdiction has been from time to time extended, until it, as well as the Superior Court, is practically unlimited in its power. And in all those cases where it has jurisdiction of the person and the subject of the action, its powers are as complete—both legal and equitable—as those of the Supreme Court.

There are six judges in each Court. The procedure, as to Trial Terms and General Terms, is similar to that of the City Court; but an appeal lies from their General Terms directly to the Court of Appeals.

IV. SUPREME COURT.

This is the highest Court of original jurisdiction. It has jurisdiction over all causes of whatever nature.

Throughout the State it is divided into eight judicial districts, which are in turn grouped into four departments.

The Court in New York City constitutes one department by itself. There are seven Justices here; and the pressure of business is so great that one or more judges of the Superior City Courts

are usually acting as Supreme Court Justices, under assignment for the year made by the Governor of the State; and Justices of the Supreme Court from other parts of the State are also assigned to serve here at intervals.

There are four other Terms, all in session each month except July, August, and September; and two Special Terms for equity causes without juries, held each by one Justice. Another Justice sits meanwhile in Chambers for the hearing of motions.

An appeal lies to the General Term as in the Courts previously mentioned, but the Justices of the General Term in this department rarely sit except at General Term. There have, until the past year, been only three General Terms here during the year, but the number has for the present been increased to five.

In the entire State there are four General Terms of the Supreme Court—one in each department, and as these four have equal authority in determining the law, there is occasionally some uncertainty whether one department will freely adopt the opinion of another before that opinion has been confirmed by the Court of Appeals.

The appeal from the General Term of the Supreme Court is to the Court of Appeals.

V. COURT OF APPEALS.

This is exclusively an Appellate Court. It is composed of a Chief Justice and six associate Justices. It is almost always held at Albany, the capital of the State, though it occasionally transfers its seat for a few weeks to Saratoga Springs, and at very rare intervals has sat in New York City.

Except in a few specified instances, it assumes that the facts have been correctly adjudicated upon in the Court below, and considers only the questions of law.

This is the only Court in the United States, except the Supreme Court at Washington, whose members are clad in robes of office.

VI. SURROGATE'S COURT.

The Surrogate's Court is not included in the list at the head of this article, because it can hardly be classified in its rank among the others. It is now a Court of Record; and its volume of business, and the almost fabulous amounts of property which are annually distributed in accordance with its decrees, it should rank as among the most important of all the Courts.

Is presided over by one officer called the Surrogate.

It is the Court for the probate of wills and settlement of estates of deceased persons. On its weekly motion calendar it is no uncommon thing to see upwards of 200 motions.

An appeal lies from the Surrogate's decisions to the General Term of the Supreme Court.

VII. ELECTIVE JUDICIARY.

The Judiciary is entirely elective. A vacancy may be filled by the Governor of the State until the next annual election.

The term of office in the Court of Appeals, Supreme Court, and Superior City Courts, is fourteen years; in the City, Surrogate's, and District Courts, six years.

VIII. PROCEDURE.

There is no distinction whatever between law and equity causes in any part of the procedure, except that the one is tried before a jury and the other before a judge,—proceedings are regulated by a Code.

All suits, of every nature, in Courts of Record are begun by service of a summons. The summons (like subpoenas for witnesses) is drawn up and issued by the attorney himself, though it is considered a mandate of the Court. There is but one form of summons. It is usually a notice that unless the defendant appears and answers within twenty days (in the City Court, six days), judgment will be taken for the relief demanded in the complaint. If the complaint or notice stating the amount for which judgment is demanded is served with the summons, and the defendant does not appear within the time limited, judgment may be entered by the Clerk without application to the Court.

The complaint should be a plain and concise statement of the facts constituting the cause of action, and a demand for the judgment to which the plaintiff believes himself entitled.

Within twenty days (City Court, six days) after service of the complaint, the defendant may answer or demur. A demurrer virtually admits the facts alleged in the complaint, but maintains that on the plaintiff's own showing he has no case. The demurrer is tried before a judge at Special Term. If the judgment is against the demurrant, he is usually allowed to answer the complaint on terms more or less stringent.

The answer may be a simple defence, or it may contain a counterclaim, *i.e.* one of certain independent causes of action against the plaintiff, with a demand for judgment.

If there is a counterclaim, the plaintiff may, within twenty days (City Court, six days), serve a demurrer or a reply.

At any time after issue has been joined, the cause may be put on the General Calendar by serving the attorney of the opposite party with a notice of trial, and filing with the Clerk a note of issue stating the title of the cause. The cause then has to wait its turn. At the present time (March 29th) the Supreme Court is about six months behind, most of the cases which were noticed for trial on

the first Monday of October last being still buried under the earlier issues. The City Court is somewhat further behind, and the Common Pleas not quite so far. The Superior Court has recently adopted a rule by which a calendar of 200 or 300 cases is called by the Clerk every Saturday morning, and selections are made of two or three cases for each day of the succeeding week in each Jury Term. This gives every one a chance to hear from his case much earlier than under the old system. The Court of Appeals is upwards of two years behind, and is sinking further and further under the accumulation of cases, until it has become almost a denial of justice to allow a defeated party to carry his case up to the Court of Appeals. When a case, in the Courts of original jurisdiction, reaches the upper part of the General Calendar, it is put on the Day Calendar and is tried, unless either party succeeds in adjourning it.

These great delays, however, are more peculiar to jury trials. A case noticed for the Special Term can usually be disposed of at the term for which it is noticed. And actions on contract, which can be tried within an hour, and where the defence is believed to have been interposed for purposes of delay, may be put on a Special Calendar on Friday of any week after issue has been joined, and are then tried immediately.

Up to the time of trial none of the ordinary papers are usually filed in Court. This system proves of great advantage, as each party is kept constantly informed of what is going on by receiving the papers at his own office, instead of being under the disagreeable necessity of searching for records with the Clerk.

In all cases the party on whom the burden of proof lies, opens the trial with his evidence. The evidence of the other side is then taken, when the first party may rebut any new evidence which has been presented by the second. This latter evidence may again be rebutted, in the discretion of the Court. Considerable latitude is allowed in the presentation of evidence, and either party, if the other is not taken by surprise, may usually amend his pleading on the trial so as to conform with the evidence. All the testimony is taken down by a stenographer, who is a sworn officer of the Court. Argument may then be had by the respective counsel,—he who opened the case having the last word. The trial judge then charges the jury, and either party may take exception to any portion of the charge, and may request any number of such charges as he thinks proper.

If it is a jury trial, the defeated party makes a formal motion on the spot for a new trial. This motion purports to be made on the stenographer's minutes, and is almost invariably denied. The object of making it is that an appeal may be taken on the facts, *i.e.* on the ground that the verdict is contrary to the evidence.

The appeals are, one from the judgment which is entered in

accordance with the verdict, and one from the order denying the motion for a new trial. The two appeals are heard together. The former brings up the regularity of the judgment and the questions of law; the latter enables the Court to reverse on questions of fact (which latter, however, it rarely does).

If the trial is at Special Term, the Court is required to find or refuse to find each question of fact or law which is involved in the pleadings, and is presented in writing by either party. A new set of findings is then prepared in accordance with the decision of the Court, which set of findings is then signed by the Court. The decision is required by the Code to be rendered within twenty days after the end of the term, but practically the Court decides the issue whenever it pleases, and sometimes withholds the decision for several months. The appeal is from the decision and from such of the findings and refusals to find as the defeated party deems incorrect. In complicated cases of equitable jurisdiction, particularly those which involve the examination of a long account, the Court may of its own motion send the case to be tried before any attorney and counsellor at law as referee. This referee conducts the trial in all respects in the same manner and with the same powers as the Court. And when this report, with the evidence and findings, is returned to the Court, the Court may either confirm, modify, or reverse the decision of the referee. Particular questions in cases of equitable jurisdiction are sometimes sent to a jury, and the verdict of the jury then comes before the judge with the same effect as the report of a referee,—merely for the guidance of the Court, and subject to its reversal.

Appeals to the General Term must be taken within thirty days after service on the attorney of notice of entry of the judgment or order appealed from. The appeals are heard on a printed book, which contains copies of all the material papers in the suit and such portions of the evidence (usually nearly the whole of it), reduced to narrative form, as are necessary to determine the merits of the appeal.

The times within which appeals must be taken from any General Term to the Court of Appeals, are 60 days from an order and one year from a judgment. If an appeal is taken from an order at General Term reversing a judgment below, and granting a new trial, the appellant is required to stipulate that if the Court of Appeals sustains the General Term, judgment absolute shall at once be rendered against him.

In order to stay execution on any judgment appealed from, the appellant must give an undertaking with two sureties, each of whom must justify in double the amount of the judgment. In appeals to the Court of Appeals, an additional undertaking is required to cover the costs of appeal, and in no event is the appeal ever allowed to be taken without this undertaking for costs.

IX. EXPENSE OF LITIGATION.

This is hard to estimate. The costs and disbursements which are taxed against a defeated party, in the first instance, are very rarely as low as \$100. The appeal to General Term will cost about \$70,—not counting the stenographer's minutes (which must be paid for at the rate of ten cents for each hundred words), or the printing of the case on appeal, and the points of counsel—both of which bills may be almost indefinitely large where there has been a great deal of evidence. The appeal to the Court of Appeals will cost certainly as much as \$100. All these different sums are of no benefit to the victorious party, as they are the perquisite of his counsel.

The minimum cost, therefore, to a defeated party, in a case which goes through the Court of Appeals, can hardly be estimated as low as \$300, and the copy of the stenographer's minutes, printing, costs on motions, referee's fees, and numerous small disbursements, may swell the sum to a much larger volume—to say nothing of the outlay for counsel's fees, which are entirely dependent on the reputation of the counsel and the ability of the client to pay.

LILIAN HERBERT ANDREWS.

Reviews.

A Handbook of Written and Oral Pleading in the Sheriff Court.

By J. M. LEES, M.A., LL.B., Advocate, Sheriff-Substitute of Lanarkshire, Author of *Sheriff Court Styles* and the *Small Debt Handbook*. Glasgow: William Hodge & Co.

THE first edition of the author's *Sheriff Court Styles* contained some excellent memoranda on pleading and the conduct of a cause. These, however, were omitted in the second edition, under a promise to issue them in a separate form on some future occasion. This promise Mr. Lees has now amply fulfilled, the present handbook containing much more than the memoranda referred to.

Mr. Lees professes to deal only with pleadings in the Sheriff Court, and his handbook probably derives its chief value from his intimate acquaintance with the practical working of the Sheriff Court Act of 1876. Indeed, the book may be described as a guide-book to modern Sheriff Court practice. But Part III., on "the conduct of the cause," contains many observations and suggestions (e.g. as to the examination of witnesses) quite as applicable to causes in the Supreme Courts as to causes in the Sheriff Courts. Junior counsel may, with advantage to their clients, read, mark, and inwardly digest those observations and suggestions; for hitherto they have had no guide but the Parliament House poet,

who has illustrated "the way to cross a judge, and lose a plea." We do not, of course, mean to say that the art of pleading or of examining witnesses can be acquired by the mere study of abstract rules, or that a Sheriff-Substitute is peculiarly qualified to explain how judicial personages are swayed; but undoubtedly some useful practical rules may be deduced from such experience as Mr. Lees has had on the bench of the Sheriff Court of Lanarkshire.

We have much pleasure, then, in recommending this handbook to all classes of legal practitioners. We may add that a glance at the list of authorities to whom Mr. Lees refers (including Coldstream, Naismith, and Quintilian) is sufficient to show that he has not neglected any men of light and leading.

The Month.

NOTES FROM LONDON.

MR. O'DONNELL's action against the *Times* is 296th in the jury cause list for Easter. It will probably be reached in May.

* *

THE Lord Chancellor's Lunacy Bill contains a provision which will rejoice the hearts of medical men, and prevent such cases as that of *Mason v. Marshall, Shaw, and Gauchard*, from ever getting to trial. A defendant against whom proceedings are taken, in respect of his having granted a certificate of lunacy, may have them stayed on satisfying a judge of the High Court "that there is no reasonable ground for alleging want of good faith or reasonable care."

* *

MISS VON FINKELSTEIN's action against the publishers of the *British Weekly* has been settled. The defendants have withdrawn all their imputations, and apologised for having made them. Doubtless valuable consideration has also "moved" from the defendants to the plaintiff. At the time when I write, the counter-action raised by Dr. Merrill against the Sunday-School Union is still pending.

WE had recently occasion to notice an action at the instance of the mother of an illegitimate child for its recovery from the custody of others to whose charge it had been committed by her. Such an action is purely personal to the mother, and cannot be

insisted upon after her death by a tutor nominated by her (*Hammel & Brand v. Shaw and Others*, Feb. 24, 1888, First Division).

* * *

ALTHOUGH the report of the above case does not reveal the fact, it is easy to discover that this action was one due to the activity of clerical agencies. A poor woman allowed her child to be sent to a charitable institution. She afterwards raised an action in the Sheriff Court for recovery of the child, but died while it was pending, having made over *her estate* to a Roman Catholic gentleman in Glasgow, nominating him tutor, curator, and guardian.—The Court of Session seems to have inclined to the opinion that the action as originally laid in the Sheriff Court was competent at the instance of the mother. But *per* the Lord President: "No one could have brought it except the mother of the child, because she alone had the legal title, the child being illegitimate. That is a title that can never pass to another. She cannot cover it by any deed, either *inter vivos* or *mortis causa*. Mr. Brand has plainly no title as executor, because it is not an action to recover any of the deceased's money."

* * *

IN a recent appeal against a conviction under the Mines Regulation Act, Lord M'Laren granted interim liberation upon a motion being made, without requiring the presentation of a separate petition (*Lees & Rae v. Dykes*, Feb. 2, 1888). "The inherent jurisdiction of the High Court of Justiciary is sufficient to support an order for interim liberation under any new form of appeal that may be provided by Parliament, if that matter is not expressly dealt with in the statute."

* * *

Is a minor nun entitled to demand a separate sum for her maintenance in a convent from her stepmother, who is under an obligation to maintain her husband's daughters until they attain majority or marry?—The Second Division have decided this question in the negative. The widow was only held bound to aliment those children who remained in her house, and accordingly the bride of heaven was left to her own resources (*Barry's Trustees v. Barry*, March 2, 1888).

* * *

In giving judgment in the case of *Duncan's Executors v. Duncan* (March 9, 1888), Lord Young made the following remarks upon the doctrine of erasure:—"We have had the doctrine of erasure pressed upon us. I confess that I have always regarded our law of erasure as mischievous. I have never regarded with equanimity that law of erasure. I do not think it will prove

mischievous here, but it has proved mischievous in a great many cases. It is peculiar to our law, and with all our excellences we have our peculiarities which are more or less regrettable. But there are peculiarities in every system. Did any of us in the course of his practice and experience ever find that doctrine of erasure operate otherwise than mischievously. The result of it is, I think, to defeat and not to permit justice. Did you ever know it to operate otherwise in any of the cases except, indeed, in the case of entails. We know that when entails prevailed to a larger extent than they do now, it was almost a profession to hunt up entails and try to find an erasure, and then bring a reduction of the deed on the ground that there was an erasure *in essentialibus*. Such things were hailed enthusiastically, and were generally received with great favour."

* * *

IN the above case the erasure occurred in the signature of a testator to his will. No notice of this erasure was taken in the testing clause. But it was proved that the will had been kept for years in the repositories of the deceased, and that he intended it to be effectual.—The Court unanimously found the deed to be a valid one.

* * *

IN the case of a sale of turnip seed, the sellers sold seed bearing a certain name, but under the condition that they give no warranty, express or implied, as to description, quality, or productiveness, or any other matter, of the seeds they send out, and that they will not be in any way responsible for the crop. The article sold proved to be a mixture of the seed ordered, and of another unsuited for the purposes of the buyers.—It was held that this condition was sufficient to protect the sellers (*Smith & Son v. Waite Nash & Co.*, March 9, 1888, First Division).

* * *

IT is not competent to appeal to the Court of Session the interlocutor of a Sheriff restricting proof to the writ or oath of a defender. Such an interlocutor does not fall under the 24th section of the Sheriff Court Acts of 1853. So the First Division have recently decided, following the decision in *Shirra v. Robertson*, 11 Macp. 660; *Wilson v. Brakenridge and Others*, March 15, 1888.

* * *

THE case of *Milne v. Leslie* (Feb. 29, 1888), Second Division, has decided a point of considerable importance to Sheriff Court practitioners. Under the Small Debt Act, a party is allowed to appear either personally, by one of his family, or by such person

as the Sheriff shall allow. Under the Law Agents Act, no person can practise as an agent before any Sheriff Court unless he is an enrolled law agent in terms of that Act. The judges of the Second Division were called upon the other day to determine whether a party not so enrolled can conduct, with the leave of the Sheriff, small debt cases for remuneration. By a majority the Court have held that he can.

* * *

LORD RUTHERFURD CLARK dissented, as he so frequently does, from the views entertained by his brethren. Referring to the section of the Small Debt Act founded upon by this irregular agent, he said: "The section does not relate to persons practising as law agents. It enables the Sheriff to give decree condemnator or absolver, if the party does not appear personally or by a member of his family, or by such other person as the Sheriff shall allow. It enables the Sheriff to allow another person to appear for a pursuer or defender. But I do not think that in the exercise of that power he is entitled to permit a person to practise as an agent."

* * *

PERHAPS no provision of an Act of Parliament is so steadily ignored as that contained in the Small Debt Act, to the effect that permission must be obtained and cause shown for the indulgence before an agent can open his lips in the popular tribunal for small debts. A column is preserved in all Small Debt Court books in which to enter both permission and cause; but it remains void and empty. Sheriff-clerks never, so far as we know, write within its lines, and the agents address the Court as a matter of right.—The result of this recent decision seems to render the observance or non-observance of the law of little importance. Let the agents be viewed merely as "persons," and they require no written sanction for their interference. But the Sheriff has always the right to exclude improper individuals who may prey and impose upon litigants with their sham professional qualifications. It is doubtful whether an unqualified person can sue for his hire.

* * *

SOME doubt seems to exist as to the competency of the evidence afforded by the statements of prisoners made to policemen. Lord Young has done something to clear away this doubt in his recent remarks made in the case of *Smith v. Lamb*, H. C., March 16, 1888. In that case it was pleaded that the magistrates ought to have rejected the evidence of a policeman as to a statement volunteered by the accused. "It was argued," said Lord Young, "that the constable ought to have warned him, that he ought to have said, 'Take care, don't make any statement to me, for I

shall remember it, and it will be used against you.' I know of no rule of our law requiring a constable to give any such warning, and it is ridiculous to say that a constable by not doing so failed in his duty." But Lord Young distinguishes between statements so made to policemen and answers obtained in conversation between turnkeys and their prisoners. In particular, "the law guards a prisoner against all confessions extorted by promises made to him, or inducements to confess set before him, by his jailors."

* * *

In the case of *H.M. Advocate v. McDonald*, Glasgow Circuit, Feb. 29, the following charge of reset was held irrelevant, for want of specification, by Lord Trayner. It was alleged against the prisoner that he had, on several occasions between 1st October 1886 and 1st January 1888, at his premises in a certain street, resetted 100 tons of pig iron, the same having been dishonestly appropriated by theft.

* * *

England, Scotland, Ireland, and Man.—Much has been said of late of poor Ireland and of gallant Wales, but it has been reserved for the Law Courts to draw attention to forgotten little Man, as happens in the case of *Robey v. the Snaefell Mining Company*, 57 Law J. Rep. Q. B. 134 (reported in the March number of the *Law Journal Reports*). The case not only draws attention to a dependency of the Crown independently governed, and so happily that it is apt to be overlooked, but it awakens an echo of the old controversy as to causes of action which, under the Common Law Procedure Acts, used to agitate the Courts. It will be remembered that when Order XI. first saw the light, the facilities allowed to practitioners in the High Court to scatter writs all over the world soon engaged the attention of Scotland, always business-like in her attitude and sometimes bristling. On her behalf there was inserted in sub-rule (e) of the Order, which provides that when there is a breach within the jurisdiction of a contract it matters not where it was made, the proviso "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." Ireland alone, little on the alert in matters of business, would hardly have achieved this proviso. If Scotland insisted on it, Ireland could not be left out, but the smaller of the near independent dependencies were forgotten. Minute Heligoland is divided by stormy seas, and probably never has a lawsuit. The larger Channel Islands, jealous of their own laws as they are, were calmly indifferent; and the Isle of Man, although large enough and energetic enough to be regarded, seems to have been overlooked.

This state of forgetfulness lasted for thirteen years, when difficulties arose out of an order given by the Snaefell Mining

Company to a firm of mechanical engineers at Lincoln for the supply of a boiler, engine, and connections, to be delivered at the mine, set up, and put into satisfactory working order for £585. The order was executed, but the Manx company declined to pay, on the ground that the engine was not satisfactory. An action was thereupon begun in the High Court in England, and Mr. Justice Charles gave leave to serve the writ out of the jurisdiction. On appeal to the Divisional Court, it was pointed out that the case was clearly excluded from the first four sub-rules of the Order, and that sub-rule (*f*) did not apply, notwithstanding the fact that the Isle of Man was not included in the privileges given to Scotland and Ireland. There had not been "a breach within the jurisdiction of a contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." It was argued that the terms of the contract were silent on this point, and therefore the sub-rule did not apply. On the other hand, the omission of the Isle of Man in the proviso was used as an argument in favour of excluding her altogether. The argument seems somewhat to have impressed Mr. Justice Stephen, who delivered the judgment of himself and Mr. Justice Smith. He said the rule does not go on to say "or in the Isle of Man; if it had, of course this question could never have arisen; that seems to support the view that we take." We cannot help thinking that this is rather hard on that isle. Why should Man and the Channel Isles be considered more like Canada and Australia than like Scotland? The legal system of the Isle of Man is no more foreign either in kind or degree than that of Scotland, and the fact of an independent legislature would not justify the difference. The fact is that distance was taken as the test, and would have included the Isle of Man, but she was forgotten, and not deliberately slighted. She is therefore entitled to take full advantage of such loopholes as the rest of the sub-rule allows. The Court properly reject the idea that an express contract as to the place of performance is necessary. A business contract which provides for the payment of the price at a specified place is a very unusual transaction, and the business view as well as the legal view of transactions which result in an obligation to pay money on one side, is that the debtor must seek out the creditor. Coke upon Littleton was referred to for the proposition "that it behoveth him who made the obligation to seek him to whom the obligation is made." The experience of every day in the Courts need only be appealed to. Upon a plea of payment or tender the burden of proof lies on the defendant to establish his case, and he must establish it by strict evidence. What would be said if an attempt were made to prove either issue by proving that the defendant offered to pay the plaintiff if he would fetch the money for himself?

The case is interesting, not only as bringing the Isle of Man to light, and relieving manufacturers and others who would sue at

home for goods supplied in the colonies from any difficulty of jurisdiction, but as illustrating the rooted principle of law that the debtor must seek his creditor. It was argued that this rule did not apply to cases of goods sold, but that the rule of business is payment on delivery. That is so in cases where the contract admits of a demand of payment before delivery. The case in question was not a case of that kind, because the plaintiffs were bound not only to deliver, but to fix the engine to the satisfaction of the company, before they were entitled to be paid. The part played by the Isle of Man in the case seems to give some opening to a legislator, who will find in that island a fragment of the Queen's dominions within the four seas which has been singularly neglected as a field for illustrating national rights.—*Law Journal*.

* * *

Professional Probity.—A striking tribute to the conscientiousness and ability of the members of the legal profession in England was recently paid by a writer, in referring to the comparative difficulty of obtaining English capitalists to speculate in American undertakings. He says, "One great thing totally misunderstood by American seekers after English capital, is the position of the upper classes in respect to the investment of money. . . . They are supposed to be very easily gulled and taken in. As a matter of fact, there are no harder people from whom to get money for anything. Don't imagine from this that I mean that the English nobility and gentry are either individually or collectively adroit and clever in the management of their money matters. With a few exceptions, they are not business men, either theoretical or practical. They know nothing whatever of business and the legitimate use and value of money. Then why, you ask, are they so cautious and shrewd in its investment? *They act solely on the advice of their lawyers.* Every English nobleman and gentleman of means has a regularly-employed solicitor. He is generally the family lawyer, and he has (or his firm have) been so for generations. Through his or the firm's hands pass all the moneys received from rents, interests, dividends, debentures, etc., which form the client's income, and by him are paid into bank to the client's credit. The client does nothing but draw and sign cheques as he may need them. From whence his income is derived he has but a hazy idea. He does not know himself, but his lawyer does. That is enough for him. . . . If he have any money lying idle, waiting for a profitable interest-bearing investment, he thinks nothing about it himself. He wouldn't know what to do with it. He simply leaves it for his lawyer to see to. If, therefore, Americans wish to capture the money of the British nobility and gentry, they must first capture their solicitors. *This is where the caution and shrewdness come from—the lawyers.* It would be difficult to estimate the vast sum of money in the aggregate which, in

England, belongs to the nobility and gentry, and lies at the sole disposition and under the sole (actual) control of their lawyers. Hundreds of millions, I should say. That they should be ignored in matters financial seems queer. Perhaps the lawyers are difficult to win over."—*Pump Court*.

Notes of English, American, and Colonial Cases.

COMPANY.—*Debentures—Agreement to issue—Bills of Sale Act* (1878)—*Amendment Act*, 1882, s. 17.—*Registration*.—An agreement by a company charging its real estate with the repayment of £600 and interest, and undertaking to execute a legal mortgage when requested, and further agreeing to issue to the lender debentures to the extent of £600 secured over all the capital stock, goods, chattels, and effects, including uncalled capital both present and future of the company: *Held*, to be a "debenture" in the ordinary acceptance of the term, and by virtue of section 17 of the Bills of Sale Act, 1882, to be exempt from registration as a bill of sale.—*Levy v. Abercorris Slate & Slab Co. (Lim.)*, 57 L. J. Rep. Ch. 202. *Edmonds v. The Blaina Furnaces Company* (56 Law J. Rep. Chanc. 815; Law Rep. 36 Ch. D. 215), followed and discussed.—*Ibid.* Any document which either creates a debt or acknowledges it is a "debenture."—*Ibid.*

COMPANY.—*Shares—Contract to take fully paid-up shares—Duty of registration—Companies Act*, 1867 (30 and 31 Vict. c. 131), s. 25.—At a meeting of shareholders of a company, it was resolved that a certain number of fully paid-up shares should be presented to A. in recognition of his services to the company, subject to confirmation at a general meeting. At a general meeting of the company, it was resolved by the shareholders that a sum of money be voted to A., which he agreed to take in fully paid-up shares. The agreement was not registered in compliance with section 25 of the Companies Act, 1867. The company went into liquidation. There was no satisfactory evidence of the allotment of the shares to A., although his name was entered in the ledger of the company as holder of these shares: *Held*, that there was no payment in cash for the shares. *But held*, that the company had agreed to give, and A. had agreed to accept, fully paid-up shares, and that A., not having by his acts accepted the shares and varied the original contract, ought not to be placed on the list of contributories in respect of shares which would not be fully paid up.—*In re Barangah Oil Refining Co.; Arnott's Case* (App.), 57 L. J. Rep. Ch. 195. Where a contract is entered into for the issue of shares as fully paid up, the duty of registering that contract as between the company and the allottee of the shares, rests on the party seeking to enforce the contract.—*Ibid.* Decision of North, J., reversed.—*Ibid.*

COMPANY.—*Winding-up—Compulsory or supervision order—Wishes of creditors—Costs—Companies Act*, 1862 (25 and 26 Vict. c. 89), s. 149.—A petition was presented by a creditor for the compulsory winding up of a company. At the hearing the petitioner only asked for a super-

vision order : *Semble*, that the Court had no jurisdiction, under section 149 of the Companies Act, 1862, even at the instance of a majority of the creditors, to force on the petitioner a compulsory order. In such a case the creditors asking for a compulsory order will be entitled to costs as supporting the petition.—*In re Chepstow Bobbin Mills Co.*, 57 L. J. Rep. Ch. 168.

COMPANY.—*Winding up—Prescriptive corporation—Right of fishing vested in corporation for individual members—Creditor's petition—Companies Act, 1862, s. 199.*—As a general rule a creditor of a company is entitled to an order for winding up the company to enforce his claim ; but when the company has no assets, and no good result would follow from a winding-up order, the Court will not make such an order. Where the only property of a corporation consisted of a right to dredge for oysters, which it held not for its own benefit, but in trust for the benefit of the individual members of the corporation, the Court refused, on a creditor's petition, to make an order for winding up the corporation.—*In re Company or Fraternity of Free Fishermen of Faversham* (App.), 57 L. J. Rep. Ch. 187. Decision of Kay, J., reversed.—*Ibid.*

COMPANY.—*Winding-up—Vesting order—Companies Act, 1862, s. 203.*—A vesting order under the Companies Act, 1862, s. 203, cannot, except under special circumstances, be obtained *ex parte*.—*In re Albion Mutual Permanent Building Society*, 50 L. J. Rep. Ch. 248.

DAMAGES.—*Compensation—Statutory powers—Negligence—Injury caused by the act of a third party.*—A corporation exercising statutory powers is liable in damages for injury resulting from the exercise of such powers, if the injury is caused by the neglect on their part of care which they were bound by law to exercise towards the injured party. But where the compensation for injury is provided for by statute, it must be recovered as thereby provided, and damages will not be assessed by the Court.—*Evans v. Manchester, Sheffield, and Lincolnshire Railway Co.*, 57 L. J. Rep. Ch. 153. The liability of the corporation is not affected by the fact that the injury has been directly caused by the acts of a third party.—*Ibid.* The owner of minerals under a canal worked them so as to cause a subsidence and consequent percolation of water into a mill : *Held*, that the canal company was liable for damages.—*Ibid.*

REVENUE.—*Income tax—Business carried on abroad—Partner resident in England—Liability of partner to income tax in respect of profits of business not received in England—5 and 6 Vict. c. 35. ss. 100, 106, and 108 ; 16 and 17 Vict. c. 34, s. 2, sched. D.*—The respondent, who resided solely in England, was a partner in a firm carrying on business in Australia. Of the profits due to him from the firm, part was remitted to England. Of the remainder no part was received by him in England, or had at any time formed part of his income in this country. The appellant contended that the respondent was liable to pay income tax in respect of all his profits, whether received by him in England or not :—*Held, per Stephen, J. (dissentiente Wills, J.)*, that the respondent was liable, under 16 and 17 Vict. c. 34, s. 2, to pay income tax on all the profits due to him, whether remitted to England or not.—*Colquhoun v. Brooks*, 57 L. J. Rep. Q. B. D. 70.

ADMINISTRATION.—*Intestacy—Marriage in Ireland—Divorce in India—Grant to next-of-kin—Indian High Courts of Judicature Act, 1861 (24*

and 25 Vict. c. 104), s. 9—*Indian Divorce Act (IV. of 1869)*, s. 2.—A., an officer in the British army, who had been married in Ireland, obtained, while serving with his regiment in British India, a decree from an Indian High Court, dissolving his marriage on the ground of his wife's adultery with B., committed within the jurisdiction of that Court. The respondent in the suit was shortly afterwards married to B. There was no issue of the first marriage, and A. died intestate in England:—The Court granted administration of A.'s estate to one of his next-of-kin.—*In the goods of Nares*, 57 L. J. Rep. P. D. and A. 19.

ADMINISTRATION. — *With will annexed* — *Substitution of executor* — *British Guiana, law of* — *Administrator-General* — *Grant to attorneys*. — By the law of the colony of British Guiana, when a will contains a power of substituting executors, any executor may substitute the Administrator-General of the colony in his place, and the latter thereupon becomes entitled to administer the whole of the estate, wheresoever situated, and to apply in England for a grant of administration with the will annexed. A. died domiciled in British Guiana, leaving property both in that colony and in England, and having by his will appointed B. and C. his executors and trustees, with power to substitute D. and E. in the event of B. and C., or either of them, predeceasing him or being unable or unwilling to act. C., D., and E. were resident in British Guiana, but B. was resident in England. C. partially administered the estate as executor and as attorney for B., and afterwards came to England, having previously nominated the Administrator-General to act on his behalf. B. had not renounced probate:—The Court made a grant of administration with the will annexed to the attorneys in England of the Administrator-General, until the Administrator-General or B. should apply.—*In the goods of Black*, 57 L. J. Rep. P. D. and A. 20.

PATENT. — *Practice* — *Costs* — *Disclaimer* — *Patents, Designs, and Trade Marks Act*, 1883, s. 19. — In an action for infringement of a patent, in which the pleadings had been closed by the delivery of the reply, the plaintiffs applied for leave to apply at the Patent Office with a view to the amendment of their specification by the omission of the second claim, which in another action had been decided to be bad:—*Held*, that the terms on which leave should be granted were, that the plaintiffs should pay the costs of the application and the costs of and occasioned by the disclaimer; that the plaintiffs and defendants should be allowed to make all necessary amendments of the pleadings after disclaimer; that the plaintiffs should undertake forthwith to amend their pleadings, confining the action to the specification as amended by the disclaimer, or to consent to the action being dismissed with costs. In the event of the action proceeding, all other questions of costs to be reserved.—*The Haslam Co. (Lim.) v. Goodfellow*, L. J. Rep. Ch. 245. *The Fusee Vesta Co. v. Bryant & May* (56 L. J. R. Ch. 187; L. R. 43 Ch. D. 458) distinguished, *ibid*.

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INDUSTRY AND PROPERTY.

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ALTHOUGH the mental development of man may be considered without taking account of the necessities that surround him, yet he cannot apply his mind to worship, to science, or to art, without sustaining his body. The earth only brings forth when it is bathed with the sweat of his brow. Labour, however, was not a malediction but a rehabilitation. The earth was really cursed only to Cain, to whom God said: "When thou tillest the ground, it shall not henceforth yield unto thee her strength." Nevertheless the Lord permitted him to build a city, to which he gave the name of Enoch, from whom was born Tubal-Cain in the sixth generation, "who was the instructor of every artificer in brass and iron."—Leaving the Semitic traditions for the Aryan traditions, we find that the cultivators and the artisans sprang from the thighs of Brahma, while the priests were brought forth from his mouth, and the warriors from his arms. Many centuries before our era, history shows us the Pelasgi spread over all the shores of the Mediterranean from Etruria to the Bosphorus, in Arcadia, Argolis, Attica, Latium, and perhaps also in Spain, where they left everywhere indestructible monuments, in walls formed of enormous blocks of stone without any cement. "We are astonished," says Michelet, "to see a race that was spread through so many countries disappearing in history. Its various tribes perish; they are absorbed among foreign nations, or, at least, they lose their names. There are no other examples of a ruin so complete. An inexpiable malediction is attached to this people; all that its enemies tell us of it, is ill-fated and bloody. To them belong the women of Lemnos, who slaughtered their husbands in one night; they were the inhabitants of Agylla, who stoned the Phocæan prisoners. Perhaps this ruin of the Pelasgi, and the hostile tone of the Greek historians with regard to them, may be

explained by the contempt and the hatred inspired in the heroic tribes for the agricultural and industrial populations which had preceded them. In fact, this was the character of the Pelasgi. They worshipped the subterranean gods who guarded the treasures of the earth; as agriculturists or miners they tore open its bosom, in order to draw from it gold or corn. These new arts were odious to the barbarians; every industry they did not understand was regarded by them as magic. The mysteries of the initiations which the various corporations of artisans practised, lent appearance to the most odious accusations. The magical worship of flame, that mysterious agent of industry, that violent action of the human will upon nature, that mixture and soiling of the sacred elements, those traditions of serpent gods and of dragon men of the East who worked by fire and magic: all this terrified the imagination of the heroic tribes. They had only the sword to use against the unknown powers of which their enemies disposed; and everywhere they pursued them by the sword. It is related that the Telchines of Sicyon, of Bœotia, of Crete, of Rhodes, and of Lydia, poured at will the water of the Styx on plants and animals. Like the magicians of the Middle Ages, they predicted and raised tempests. They pretended to heal diseases; and could they not also smite any one at will? The Cabiri of Lemnos, of Samothrace, and of Macedonia—the same name designating the gods and the worshippers—were forgers and miners like the Cyclopes of the Peloponnesus, of Thrace, of Asia Minor, and of Sicily, who, with a lamp fixed on their forehead, penetrated into the depths of the earth.”¹

Max Müller expresses the opinion that the Turanian or Tartaro-Finnic race had preceded the Semitic and Aryan races. Wherever these two races penetrated, they found savage peoples which they exterminated, but whose memory survived under the representation of giants, of magicians, or of animals. Some of these peoples attained to civilisation; as the Cushites and the Hamites in western Asia and in Africa, and the Chinese in eastern Asia. This primitive civilisation had a materialistic character, with a religious and poetic instinct that was little developed, a feeble sentiment of art, a tendency to elegance and to refinement, a great aptitude for the manual arts and for the applied sciences, a positive spirit inclined to commerce, to comfort, and to amusement. It had no political life, but instead of it an administration so complicated that it has not been equalled in Europe, except in the Roman Empire and in modern times. The traces of the Cushite and Hamite civilisation disappeared at the contact of the Aryan civilisation, but the Chinese form of it still subsists in our day.

Labour supposes property: (1) in our own faculties, and (2) in the matter to which they are applied. This is evident in the case of material labour; but all doubt will also cease in regard to

¹ *Histoire de la République Romaine*, ch. iii. p. 283.

intellectual labour, whenever it is considered that the artist is master of the marble which he sculptures, and the writer of the pages to which he entrusts his ideas, as in like manner the professor and the physician are masters (at least for the moment) of the attention of the scholar and the body of the invalid.

Property, like society, is natural to man as endowed with liberty. Liberty consists in the full possession of oneself, in the capability of developing the proper activity of one's own talent, and enjoying its fruits. The free man labours, and then possesses. Property involves the right to labour, to form capital, to exchange, and to donate. As property is not extinguished with death, so when a person has not disposed, the positive law disposes for him according to his presumed will. In principle, then, all men have implicitly the right to use external things for the rational ends of life. But as there are not separate external things sufficient for all, society has established rules according to which the individual may acquire, preserve, or lose the immediate power over them. The State, which represents society, has not divested itself on this account of all right of interference, but has always a supreme dominion (*dominium eminens*) over property, which it exercises by means of the protection, the guarantee, and the rules which regulate the use of it, as is specially the case with forests and mines. By its imposts, it assigns to itself a part of property, and reserves the right to dispose of it by means of expropriation for the public utility. Accordingly the State, with its eminent dominion, represents the social side of property, and establishes the organic bond that binds it to the various generations when it determines the modes of transmission and of succession.

It was only slowly that this comparatively perfect form of property was reached. The investigators of positive Law have explored all the corners of the earth in order to find the transitions from one form of it to another. It may suffice to refer to Sir Henry Sumner Maine (*Ancient Law; Lectures on the Early History of Institutions; The Village Communities of the East and West*), and M. Emile Lavelèye (*De la propriété et de ses formes primitives*), and to indicate their conclusions.

Sir Henry Sumner Maine, in the works referred to, shows that the family and ownership of property were organized in an identical manner among the old Aryan peoples from Ireland to India. —The population was divided into clans or tribes, whose members believed themselves to be connected by a family bond as the descendants of a common ancestor. At the head of the clan there were found chiefs, whom the Irish traditions called "kings." When the clan was numerous, it was subdivided into groups, whose members were united with each other by a bond of kinsmanship, and subject to a chief whom the Anglo-Irish legists designate under the name of "*capita cognationis*." These groups corresponded to the Roman *gens*, to the Greek *γῖνος*, and to the *gentes*

or *cognationes hominum* of Germany, among whom, as Cæsar relates, the soil was divided every year. The juridical and political unit in the social order was not, as in the present day, the isolated individual, but the family group, denominated *Sept*, which corresponds exactly to the *Zadruga*, a family community which the Germans more properly designate *house-communion*. The *Sept* resembled those family groups, societies of *companions* or *frerescheux*, the confraternities which in the Middle Ages assembled in France in one large house (the *Sella*), and which cultivated the soil in common, and divided its products among each other. India, even in our day, offers us in the *joint-family*, as the English call it, the exact image of the Celtic *Sept* of Ancient Ireland. The joint-family forms a moral person which acquires property, and has a perpetual duration like all corporations of *mortmain*; and it offers the perfect type of that archaic mode of undivided enjoyment which is found in all primitive agricultural societies. It embraces all those persons who might have participated in the funeral sacrifices of the common ancestor. It resembles the agnatic family of the Romans, which comprehended all those who might have been subject to the authority of the common progenitor, if he had been still alive. According to the decisions of the courts of justice in India, no member of the family has a separate right to any part of the common property, but its products ought to be put in charge, and then divided according to the rules of an undivided enjoyment. The members of the family are united, as it is said in India, by their *food*, their *worship*, and their *land*.—The Irish tribe constituted a civil person which was maintained by itself, as is said in the *Brehon Laws*. At first it was perpetuated with the possession of the land—"the land is a perpetual person;"—but it was also able to subsist without cultivating the soil, by the exercise of some industry. A part of the territory of the tribe, probably the arable land, was divided among the different families of the *clan*; although these quotas were subject to the control of the community. "Every one," says the law, "ought to preserve his land undiminished without selling it, without burdening it with debts, and without giving it away in payment by right or contract." As in all the ancient customs, alienation was permitted only with the consent of the whole community, and so it is still practised in India. The obligation to follow the same rotation of crops in the order of cultivation—the *Flurzwang*, as the Germans call it—is in this system as strict as in the Russian *mir*, and in the old German *village*. The words of Tacitus: *Arva per annos mutant*, are well interpreted in this sense by Belot. The annual abandonment of the settlements was caused by the nature of the soil, the scarcity of manure, and the insufficiency of the agricultural instruments.¹ In a former passage

¹ Cf. Nantucket, *Étude sur les diverses sortes de propriétés primitives*. Paris, 1884.

Tacitus had laid emphasis on the nature of the proprietorship, stating: *Agri pro numero cultorum ab universis in vices occupantur quos mox inter se secundum dignationem partiuntur*. This division was no longer annual, as in the time of Cæsar, but it was made at indeterminate periods. The phrase of Tacitus, *apud eos nullum testamentum*, is applicable not only to the Germans, but to the Irish Celts, and to all the primitive peoples.

Lavelèye remarks that "so long as primitive man lives by the chase, by fishing, and by the gathering of wild fruits, he does not think of appropriating the land, and he considers as his own only the objects he has captured or fashioned by his hand. Under the pastoral régime, the notion of territorial property begins to dawn. It is attached, however, only to the space which the herds of each tribe habitually range over; and frequent quarrels break out on the subject of the limits of these ranges. The idea that an isolated individual could claim a part of the soil as exclusively belonging to himself, does not yet occur to any one; the conditions of the pastoral life are absolutely opposed to it. At the moment at which the Romans and the Greeks appear in history, they have arrived at a state of civilisation that is more advanced and more modern than that of the Germans of Tacitus. They have already passed for a long time from the pastoral régime; they cultivate corn and the vine, and nourish themselves less on flesh. It is agriculture which furnishes them with the greatest part of their subsistence. Nevertheless there still remain very recognisable traces of the primitive régime of the community. Thus cattle would not have been able to serve as a means of exchange, had not the greatest part of the land been a common pasturage, to which every one had the right to send his herds and flocks. The two customs are so closely connected, that the one cannot be conceived without the other. With individual and limited proprietorship I cannot receive oxen in payment; for how shall I nourish them? If cattle are used as instruments of exchange, it may be inferred from the fact that a great part of the soil is collective property."¹

Leaving the Greeks aside, we shall accompany Mommsen in his exposition of the origin of property in the soil among the Romans. "Among the Romans the land was for a long time common good, and the ownership of immoveable property is very recent. At first the ownership of property was limited to the possession of slaves and cattle (*familia pecuniæque*). . . . *Mancipatio*, the first and universal form of sale, springs from the ancient period in which ownership did not yet extend to the earth, because it took place only in reference to those objects which the hand of the acquirer could seize. The possession of lands was originally a common possession, and it was undoubtedly divided among the different family unions; only the products were divided according

¹ *De la propriété et de ses formes primitives*, p. 4. Paris, 1882.

to households. In fact the agrarian community and the city, constituted by family unions, were connected by close relations with each other; and long after the founding of Rome, we still meet true communists who lived together and cultivated the soil. The language of the old laws shows that riches at first consisted in herds and real rights, and that it was only much later that the soil was divided as private property among the citizens. The original land estate was called *heredium*, from *heres*, and it contained only two *jugera* (about one acre and a third), a space like the extent of a garden, and little greater than the small field enclosed by hedges among the Germans. If the two *jugera* did not suffice to support a family, it received a part of that common land of the tribe or State, which was the original *ager publicus*, and which gradually grew through the conquests of the kings and of the republic, and which was very soon usurped by the patricians. This usurpation was the occasion of the struggle of centuries between the patricians and the plebeians, till the time of the emperors; and to the plebeians it was a question of life. A group of families which formed a *clan* inhabited a village (*vicus* or *pagus*), the union of clans constituted the nation (*populus*) or the State (*civitas*); and the State had, as its centre, a fortified place or a citadel, which was always situated upon a height."

In its development property followed the status of the persons connected with it. At first the only proprietors were the *cives optimo jure*. Their property was called *dominium Quiritarium*, and they were able to vindicate it from any one. The necessities of life compelled the recognition of another species of property, called that in *bonis*, or *dominium bonitarium seu naturale*, to which the ancient law did not concede any right of action. The praetor supplied this by the *actio Publiciana*, which took the place in this connection of *vindicatio*. The citizens no sooner became all equal under the empire, than these old distinctions disappeared, and the right of property consisted of these three elements: (1) The right to use the thing without otherwise appropriating its fruits, that is, to apply it simply to one's own use, advantage, and enjoyment (*Jus utendi*); (2) the right to gather the fruits produced by the thing (*Jus fruendi*); (3) the right to draw from the thing a utility by changing it, transforming it, and even destroying it (*Jus abutendi*), which, in the juridical language of the Romans, did not mean to make a bad use of it, as it is written in the Institutes: *expedit reipublicae ne sua re quis male utetur*.

Under these free proprietors lived the cultivators or farmers and the slaves. The former were also called *rustici*, *originarii*, *adscriptitii*, *inquilini*, *tributarii*, *censiti*, words which all indicated a class of men who lived on the land and were engaged in agricultural labours. They were not slaves; they were able to marry at will, and to have recourse to magistrates on occasion of grave injuries to their persons or in reference to exactions that

went beyond use and wont. They constituted a part of the estate like the cattle (*servi terræ glebæ inhærentes*), and they were not entitled to abandon it under any pretext, the proprietor having a right to reclaim them even from among the ranks of the clergy. The fruits of the land belonged to them, and they owed to the proprietor only an unalterable proportion in commodities (*redditus annuus functionis*) fixed by custom. The slaves possessed a *peculium*, but it was always at the disposal of their master.

The Germans—as we are told by Cæsar, Tacitus, and Ammianus Marcellinus—had likewise agriculturists and slaves. The former were hereditary cultivators of the lands which were conceded to them for a regulated consideration; the latter were bound to domestic services or to the cultivation of the lands reserved for the daily uses of the family. In the bosom of the families were formed the *bands* which elected a chief for some distant expedition. Tacitus says: “If a tribe languishes in the idleness of a long peace, the principal youths go to the nations which are at war, because repose is irksome to this people. The warriors become illustrious in the midst of dangers; and it is only by means of war that they can preserve many followers.”

The Roman Empire was invaded by these bands, which brought with them the organization of the tribe, with the addition to it of the bond of military subordination. The chiefs spread themselves over vast domains, where they lived along with a few companions in arms. The organization of the tribe could not but be altered by their change of place. In Germany the sovereignty in relation to general affairs belonged to the assembly of the heads of families or proprietors; and in reference to particular affairs, to every single head of a family. This last species of sovereignty had a double origin and a double character. On the one hand, it had the bonds and the customs of the family, the proprietary head being the chief of the clan, surrounded by his relatives, down to the most distant grade and in every kind of condition; and, on the other hand, it was founded upon conquest and force, a part of the territory having been occupied with arms in their hands and the conquered having been reduced almost to slavery. After the conquest the re-union of the common assembly became always more difficult; and consequently there remained only the second form of sovereignty, which extended itself not only over the cultivators and slaves of the Roman world, but also over the free men who had come from Germany. Guizot accordingly says: “How is it possible for those who are living beside a chief who had become a great proprietor possessed of a thousand means of influence, and whose superiority increased every day, to preserve long that equality and that independence which the companions of the same band formerly enjoyed? Evidently this could not be. Those free men who, after the invasion, still lived for some time around their chief, were not long in becoming divided into two

classes : some received benefices, and, having become proprietors in their turn, they entered into the feudal association ; others, always fixed in the interior of the domains of their ancient chief, fell either into a condition entirely servile, or into that of cultivators working a part of the land under obligation to discharge certain services or performances.”¹

Three centuries had passed from the time of Tacitus, and temporary possession had become converted into proprietorship. The first act by which the barbarian invaders affirmed their power over the conquered Romans was the partition of the lands. Thus arose the feudal system (*feodum*, from *fe* or *fee*, wage, and *od*, possession), which ruled property during the Middle Ages. However, by degrees, the kings from *grands seigneurs* became really heads of the nation, and claimed for themselves all the sovereign prerogatives. Nevertheless, those thousand abuses did not cease which had confused the persons with the land, to the shame of all the powers of the legists, who strove to bring about the triumph of the conception of the Roman proprietorship and of absolute monarchy, which attributed to the king not the *dominium eminens*, but the full proprietorship in the goods of their subjects, as appears from this passage in the Instructions written by Louis XIV. for the Dauphin : “Everything that is found throughout the whole of our States, of whatever nature it be, belongs to us by the same title. You ought to be persuaded that kings are absolute lords, and have full right of disposal over all the goods possessed by ecclesiastics and laymen so as to use them at all times.”

The French Revolution of 1789 limited the powers of the king, and removed all confusion between persons and possessions. In the celebrated night of the 4th August, Feudalism was abolished, all personal servitude being made to cease without any compensation and facility being given for redeeming every real servitude. By personal servitude, says the Instructions of 15th June 1791, is meant a subjection imposed on the person, and which he has to bear only because he exists or dwells in a particular place. The report of Merlin adds : “There are abolished without possibility of restoration personal servitudes and the rights which are derived from them or which represent them ; that is to say, such as are not sprung from contracts of infeudation or from taxation, and which are due only from persons independently of all possession of the soil, and which have as their basis only the bold usurpations of feudalism maintained by the power of the lords of the soil, legitimated by the *law of the strongest*.” These wise restrictions were set aside by the Legislative Assembly, which respected only the rights resulting from a primitive concession of the soil, rights which, however, were not respected by the Convention.

After a long course of centuries, the notion of property returned to what it was in the Roman Law, to which corresponds, in the

¹ *Histoire de la Civilisation en France*, Leçon xxxiii.

main, Article 544 of the French Civil Code, which became Article 436 of the Italian Code, and which runs as follows: "Property is the right to enjoy and to dispose of things in the most absolute manner, provided that there is no use made of it that is forbidden by the laws and the regulations."

Among the other non-Aryan races property passed through nearly the same changes. The Mosaic law, for maintaining property in the same tribes and in the same families, cancelled debts every seven years, and commanded the restitution of alienated lands every forty-nine years at the Great Jubilee. Among the Arabians, property consisted in moveable objects and in cattle; and even in the present day the land in Algeria belongs in common to the members of the *douar* or village, to whom it is distributed by the Cadi. After the Mohammedan Conquest, the lands abandoned by the infidels, and divided among the believers, constituted a real individual property, which was transmissible by sale, donation, and succession. The Koran and the Sunna acknowledge full proprietorship in desert lands that have been rendered fruitful by labour. "If any one gives life to a dead land," says Mohammed, "it belongs to him." Nevertheless, the free proprietorship, called *mulk*, is an exception in Mussulman countries. Fabrics and trees form objects of property, but not the land that supports them—called *emiré*—which belongs to the State, and is given in simple enjoyment to private individuals. The Christians are simple tributaries, the hereditary possession of the land belonging to them on condition of labour and of tribute. Originally such tribute was assigned to the Arab chiefs in certain given territorial circumscriptions, which have been erroneously compared by writers to feus, although, as Renan points out, the most essential element in the feudal system, the land, was wanting in the arrangement.

Of the nations belonging to the Turanian race, China has practised all the systems of ownership in property from complete community to equal division of the soil; and this latter arrangement has been carried so far as to demand that every possessor should cultivate his share with his own hands, a refinement not yet reached by the modern socialists. Nevertheless, according to Eugène Simon, formerly French consul in China, a portion of the property is inalienable in the case of every family. At the beginning, this inalienable part extended to thirty *hectares* (about seventy-four acres), but now it is reduced on the average to three or four *hectares*, and is called the patrimonial field. Of 330 millions of hectares which constitute the territory of China, from 70 to 75 millions are found thus restricted. The patrimonial field represents the whole tradition of the family. It is there that we find established their habitation and their burying-ground; in it rises the hall where twice in the month the family assembles to judge the delinquencies and the offences and shortcomings of the

members of the family ; and it is there where the family archives are preserved. According to Simon, this system keeps the inhabitants in the country instead of turning their minds from cultivation, and driving them into the cities, as is the case in Europe.

America was peopled by a northern race, a branch of the Turanian race. To the greater part of the population of the new continent the land was common to the tribe for the purposes of the chase and fishing ; and custom recognised only moveable property. However, the two empires of Peru and Mexico raised themselves to a certain degree of civilisation. Here is what Robertson writes regarding the system of ownership in property : "The state of property in Peru was no less singular than that of religion. . . . Neither individuals nor communities had a right of exclusive property in the portion set apart for their use. They possessed it only for a year, at the expiration of which a new division was made in proportion to the rank, the number, and exigencies of each family. . . . In the Mexican Empire the right of private property was perfectly understood, and established in its full extent. Every person who could be denominated a freeman had property in land. . . . The tenure by which the great body of the people held their property was very different. In every district a certain quantity of land was measured out in proportion to the number of families. This was cultivated by the joint labour of the whole ; its produce was deposited in a common storehouse, and divided among them according to their respective exigencies." ¹

Facts, the sons of the free will, had an influence upon ideas, the daughters of reflection. Minos and Lycurgus reduced to laws the Dorian customs that prevailed in the island of Crete and at Sparta. Pythagoras raised them to a doctrine in the maxim : "Everything is common among friends." It is still disputed as to whether Pythagoras wished to found an institute of education for wise men and statesmen, or set forth a social ideal. The first hypothesis is the most probable ; and thus his communion would only have been voluntary, and limited to a certain period of life.

Plato, in the *Republic*, set himself to formulate this ideal by abolishing individual property and the family. He was not long in perceiving that he had gone much beyond the mark, and, wishing to take account of the prejudices and of the weakness of his compatriots, he delineated in the *Laws* the plan of a society less perfect but more adequate to the ideas of his time. However, the dream of community of possession always followed him. Here is how he expresses it in Book ix. : "I declare, in my quality of legislator, that I do not regard either yourselves or your goods as your own, but as belonging to all your family, which with all its goods

¹ *The History of America*, Book vii.

belongs to the State." Under the guidance of these principles, he divides the territory into 5040 portions, a number equal to that of the active citizens, that is, of those who have the right to participate in the administration of the State and to carry arms. Each of these portions is inalienable and indivisible; and they are distributed by means of the lot. The use of the precious metals and borrowing at interest, as well as the industrial and commercial professions, are severely interdicted from the active citizens. The trades are exercised by slaves under the direction of free artisans, who are devoid of political right; and commerce is left to strangers, choosing out the *least corrupt* among them. Every active citizen is to be entitled to transmit at his death to one of his sons the portion of land possessed by him; but the laws are formally opposed to allowing more than one portion to fall into the same hands. The citizens may possess moveable riches up to four times the value of their lands; but how were they ever to acquire them, not being able either to work, or to use monies in gold or silver, or to borrow on interest, or to carry on trade? Perhaps by booty acquired in war. All the citizens are to be fed at one table, at the expense of the State. In order to maintain the balance between the number of citizens and the portions of the land, the magistrates were from time to time to interdict generation; and if this remedy turned out insufficient, they were to think of founding a colony abroad. As to women, they are not to be common as in the Republic; but they are to take part in the labours of the men, as also in the dangers of war.

Aristotle observes that property is an essential part of the Family and also of the State, because men have wants, and ought to have wherewith to satisfy them. He maintains against Plato the utility and the legitimacy of property; considering it, however, as a fact, the origin of which it is idle to investigate. The law, agriculture, and booty appear to him three modes of acquisition, equally legitimate. Occupancy, even by means of force, seems to him the useful beginning and principle of property. And indeed in antiquity, property could not appear but as a violent fact, protected afterwards by the law, which modified it arbitrarily every day. Nothing was more common among the ancients than the intervention of the Government in the distribution of properties, division of lands, abolition of debts, and the prohibition of any abandonment of one's patrimony. All these provisions, which we regard as contrary to right, were very frequent in the republics of Greece; and Aristotle cites various examples of them.

Christianity tempered the rigour of property by charity. We bring all that we possess, says Justin Martyr, and divide it with the needy. Everything is common among us except the women, says Tertullian. St. Peter had expressly acknowledged the right of property; for, in the passage of the Book of Acts in which Ananias and his wife are shown to be punished with death for

having concealed a part of their possessions, we read these words: "Whiles it remained, was it not thine own? and after it was sold, was it not in thine own power?"

The community of goods was, therefore, entirely voluntary, and the Fathers of the Church explain to us how that riches and poverty exist in order to furnish the rich with occasion for their liberality and the poor with occasion for patience. It will suffice to cite the passage of the letter of St. Augustine to Hilary, in which he recalls the fact that Jesus Christ, in His answer to the rich man who asked Him what he should do in order to be saved, did not say, "Go and sell all that you have," but only, "*Keep the commandments.*" And he adds that the Redeemer, when He says that it is very difficult for a rich man to enter into the kingdom of heaven, does not condemn riches, but the immoderate love of them. Then, coming to the text in the Gospel which says, "If ye would be perfect, go and sell all that you have, and give to the poor," St. Augustine proves that these words contain an advice, and not a precept. "Jesus Christ," he says, "distinguishes precisely between the observance of the precepts of the law and a more elevated perfection; because, on the one hand, He teaches if ye would attain to eternal life, keep the commandments; and, on the other hand, if ye would be perfect, go and sell all that you have." Why then, exclaims the sainted doctor, should the rich who do not attain that degree of perfection, not be able to be saved if they keep the commandments; if they give that it may be given to them, if they pardon that they may be pardoned? This attitude and contention of the Church have never been belied: for in the first century it condemned the communism of the Nicolaitans; in the second, third, and fourth centuries it repudiated the communism of the Gnostics; in the fifth century, that of the Pelagians; and in the Middle Ages, that of the Cathari, the Paterini, the Fraticelli, the Lollards, and others.

(To be continued.)

THE STATE AND INDUSTRY.

SIR JOHN LUBBOCK'S BILL AND MR. WATT'S MOTION IN
PARLIAMENT.

DURING the past month the Legislature has considered two propositions of a kind which is characteristic of the times—Sir John Lubbock's Bill for the Early Closing of Shops, and Mr. Watt's proposal for the Acquisition of the Railways by the State. Both propositions regard an extension of the functions of Government with the purpose either of regulating or of promoting industry, and thus appeal to the principles of jurisprudence on the one hand, and of economics on the other. It is the common impression that the peculiar difficulty of all such questions lies in

reconciling the contradictions which result from the double appeal.

The revulsion of the prevailing sentiment, from what seemed, less than fifty years ago, to be a fixed affection for the principle of individual freedom, to a passion for governmental control, has to be accepted, just as the *Times* at length accepted the Anti-Corn Law League, "as a great fact;" but there is room for doubt as to how far either jurisprudence or economics will be actually regarded in the attempts of future Governments to solve questions of this troublesome class. The science of jurisprudence has been conveniently abridged into the logic of an electoral majority, and political economy has been by all but formal parliamentary decree relegated to a new political limbo—the planet Saturn. This method of conducting the business of law-making is not likely to lessen the labours of the Statute Law Revision Committees; but it is a great clearing of the ground for the pioneer politician, and if carried out in a thorough fashion would approach the sublime simplicity of the revolutionary's proposed new constitution: "*Article 1^{er} et unique: Il n'y a plus rien.*" Doubtless, however, if either jurisprudence or economics had been exact sciences, and been supported in detail by experience as the exact sciences are supported by experiment, they would not have exerted the hesitating and uncertain influence on law-making which they seem likely to do. But they deal with mind, not with matter; and in the absence of a science of psychometry, or a scale of psychological weights and measures, exactitude is unattainable, and the popular mind is as little satisfied with any other answer to its questions than Yes or No, as counsel in cross-examination. So it comes to pass that in a truly scientific age, when industry and science are hand in hand, the sciences of government are left in cold neglect, and linger scarcely anywhere but in our universities. What are the relations in which such proposals as those of Sir John Lubbock and Mr. Watt stand to the principles of law and economy? The discussions of our legislators present us with little else than the trite watchwords of opposing schools of thought—sure sign of slipshod treatment of a scientific subject—"The slavery of the masses!" "The liberty of the people!" "The rights of the individual!" "The duty of the State!"

Sir John's Bill proposed that all shops—public-houses, refreshment-rooms, tobacconists, and newsvendors excepted—should be compelled to close at eight o'clock on five days of the week, and at ten on the sixth; and that local authorities should have power to enforce observance of a public holiday if a local majority of shopkeepers approved. The Bill was professedly an outcome of the Report of the Committee of 1886, which was appointed to inquire into the hours of shop-assistants and shopkeepers, and which led to the legislation of that year prohibiting the employment of young people under eighteen for more than seventy-four

hours per week. The Report had established the fact that such employment generally extended over eighty-five hours per week,—an average of more than sixteen hours per day, leaving only eight for sleep, leisure, recreation, and improvement. The result of the Act of 1886 is to give these young people an average of about eleven and a half hours for these purposes. It has also to be kept in view that the hours of female labour in factories are now limited by law to under sixty hours per week, leaving an average of more than fourteen hours per day, including meal hours, free from manual labour. The medical evidence was especially strong in the investigations of the Parliamentary Committee of 1886 against the employment of females for such lengthened periods in shops, where there are either no chairs, or such chairs as there are are on the wrong side of the counter; and Sir John based his case on the interests of public health and public morals,—a good example of the kind of statistics adduced in support of it being the following comparison in the rates of mortality among four industrial groups:—fishermen, 189; agricultural labourers, 237; assistants in grocers' shops, 283; assistants in drapers' shops, 430. The main ground of opposition to the Bill was that adult male labour had never been considered a subject for regulation in respect of duration of labour, and that many of the working-classes cannot do their shopping at all until after eight o'clock. The majority against the Bill was as three to one.

The art of government in relation to industrial matters includes the art of maximizing the proportion of produce to population, and the art of rightly distributing produce among population. The mere formation of a primitive community has these two objects among the reasons for its existence, for three people who devote themselves respectively to the production of food, clothing, and shelter, and exchange the surplus of what each produces beyond his own requirements, will be better off than if each did everything for himself. But at the outset of the investigation we are met by the sweeping doctrine, that the only duty of the State towards industry is to leave it alone. If self-interest leads to the formation of a community, and to the combination and co-operation implied in the division of labour, it ought also to ensure of itself the highest possible participation in the benefits of such division. and so conduce to maximize production and to distribute the products according to the share of each person in the work of production. Social duties are practically eliminated as unnecessary, and abandoning the difficult heights of altruism, the doctrine establishes itself on the broad and firm ground of selfishness. In the assumption, however, of the sufficiency of that ground lies its only weakness. If human nature approximated more closely than it does to that piece of human ironmongery "the economic man," the system would work without a hitch; but if people fail to appreciate their self-interest or to obey it, either the system must

come to a stop, like a clock with the spring broken, or the State must interfere to support the failing self-interest, and so preserve the system in working order. Now it is undoubted that, as a general rule, individual men or classes of men must be held better judges of their own interest than society. There is something absurd in the idea of Sir John Lubbock's inspector buttonholing the shopkeeper who keeps open till eleven, and telling him to go home for the benefit of his health. Interferences therefore ought to be exceptional. One broad exception may however at once be made in favour of children, who cannot be supposed judges of their own interests at all. Of course the State ought to look, and in the first instance does look, to their parents to supply the prudence which their offspring cannot have acquired; but the immediate self-interest of the parents may outweigh considerations affecting the future interests of the child. This actually took place in the case of child-labour in factories and workshops, and the State interfered accordingly. The same reasoning applies to the case of women, and mothers in particular, engaged in severe industrial labour. Sir John Lubbock's Bill raises the question whether adult male labour is or is not necessarily excluded from the scope of these principles: it is impossible to see on what grounds it can be said that it is, though the presumption against interference is undoubtedly stronger. The real question in each case is not one of principle but one of fact, viz. whether or not the freedom enjoyed in absence of restraint is being abused, or—in other words—is being used in a way not calculated to promote the true self-interest of the freeman? Whenever a case of abuse is made out, interference is not only justifiable but necessary. The *morale* of an industrial population degrades much more easily and with more enduring effect than it can be raised. The English labourer, for instance, has not yet recovered the disastrous effect of the old poor law; and the power of self-help may be impaired as easily by the resignation to his fate of an overworked factory hand, with a quiverful of children, as by the habit of receiving eleemosynary aid. No doubt the most desirable end to be attained is the *education* of self-interest in the true sense, but it is difficult to imagine what else the State can do than simply compel obedience to certain regulations. Education in the case of masses of people is a matter of many years, and even a bare regulation against overtime must react on the formation of habits to some extent. On the other hand, it is certain to be in vain for the State to attempt to substitute social duty for private interest as the main-spring of an industrial system. Such a scheme would possess all the simplicity and none of the strength of undiluted individualism. If a labourer is accustomed to look to the rates to supplement a low rate of wages, it will be in vain to expect him to be stimulated to exertion by the social duty of maintaining his independence, as he would be by the necessity of going to find work instead of

waiting for work to find him. In fact the more the State interferes to guide self-interest by shutting up certain openings for abuse of freedom, the more imperative does it become to see that the force of self-interest—the motive-power itself—is not impaired. Free education does not therefore appear to be a necessary corollary to compulsory education. To refuse a man the right to bring up his child in ignorance, does not imply any duty in the State to relieve him of the burden of the education; any more than the refusal to a manufacturer of the right to employ hands in an insanitary workshop, implies a duty in the State to undertake the management of his factory. It is thus with the limits of State interference, not with the question of the admissibility of any interference, that Governments now have to deal. "During the present century," says the Duke of Argyll, in his *Reign of Law*, "two great discoveries have been made in the science of government: the one is the immense advantage of abolishing restrictions upon trade, the other is the absolute necessity of imposing restrictions on labour"—a statement which, though paradoxical, is not inconsistent, for, as Professor Walker has strenuously maintained, in refusing to apply to the problem of distribution the rule of non-interference, which is absolute in the department of exchange, no principle is abandoned, only a practical rule is left behind, the conditions of which no longer exist.

Mr. Watt's motion for inquiry into the advisability of the State acquiring the railways, contemplates an interference of a different category. There may be social utilities which it is not any one's private interest to produce, for one of two reasons. First, the utility may be of such a character that the individual could not secure any return to himself for his trouble in producing it. A lighthouse on Inchkeith, for example, may be socially useful, but if a private individual built it he might find it a hard matter to secure payment of his dues from passing vessels. Secondly, the prospect of return may be too distant to attract any person away from those investments which promise to be more immediately productive. For example, the existence of a large forest in some particular district may be certain to produce an advantageous modification of climatic conditions, but it may be that an ordinary landowner's interest in his future heirs is not quick enough to induce him to invest capital which must be buried till his plantations have grown into a forest. In either of these cases the most enlightened self-interest of educated individuals, the most perfect mechanism of "economic men," would be inadequate to supply a guarantee for the production of an undoubted social utility. The State, therefore, must be invoked. But there is another and a more difficult case, in which a social utility becomes concentrated in few hands, and the self-interest of the monopolists conflicts with the interests of the public: it is then a question whether it is not better that since a monopoly exists it should be

managed expressly *pro bono publico* instead of for individual profit.

Railways do not fall under that class of social utilities the profits of producing which cannot be appropriated by an individual producer; but had it not been for the intervention of the State to facilitate acquisition of the necessary land—which in one form or other has been characteristic of their development in all countries—they would certainly have fallen under that other class, in regard to which individual interest would have considered the difficulty of raising the necessary capital insuperable, in view of the dim and distant prospect of return. The case of the railways, therefore, like the case of Sir John Lubbock's shopkeepers, is not one of the admissibility of any interference by the State, but of the limits within which such interference is to be restrained. Railways may also become monopolies, indeed must be so, at least to the extent of being incapable of sacrificing a slight diminution of revenue which may represent a very large increase of social utility.

Mr. Watt supported his motion on the grounds that the investment would be profitable, and that the public would be better and more cheaply served. The latter contention was supported by comparisons of the railway rates in the various countries of Europe—*i.e.* rates of freight; he left the rates of travelling speed alone, which was a pity, because it is not unlikely that the difference in freight would have been more than accounted for. Who that has known the "lightning-trains" of continental railways but remembers them with impatience? The Railways Act of 1844 was referred to as being framed in contemplation of the possible acquisition of the railways by the State; and on the other side appeal was taken to the verdict of the Royal Commission of 1865, which reported unfavourably to State acquisition, and to the previous deliberations of Parliament in 1873 and 1874, when the majorities against were as three to one and four to one respectively. The chief grounds of opposition to the proposal were, in the terse words of Sir J. Goldsmid, that "the business of a Government is to govern and not to trade," and that the efficiency of the service would not be increased by introducing into railway management what Sir M. Hicks-Beach called "the curse of political influence and party sympathy." The motion was ultimately withdrawn.

Undoubtedly, in respect both to construction and management, the present system is open to criticism. In both there is a lack of completeness and system. A line will not be made unless it will pay the shareholders: the Company has no inducement to make, say, a local line which will just pay expenses; and is certain not to project one which would fail, by no matter how small a deficit, in meeting its cost. Yet a line which just paid expenses might be a very important benefit to the district in which it was made, and if the State had the management of the lines *pro bono publico*, such a line would probably be constructed,

and that *ex hypothesi* without loss to the Exchequer. Further, the State could afford, in the interests of the common weal, to construct and work a line at a slight loss in total revenue, the advantage in utility counterbalancing the drawback of slight pecuniary loss. On the other hand, the cost of acquisition now would make the bargain a hard one for the State. There are nine hundred millions of capital sunk in British railways, and the price was estimated in the recent debate at one hundred and twenty millions. The Act of 1844 requires that the purchase price shall be calculated on the scale of twenty-five years' purchase of the annual profits; but the provisions of the Act referred only to railways made after its date, and several important lines had already been laid down. Nothing can be more certain than that the State has no business to engage in trade in competition with private individuals simply for profit. It would be oppressive in the extreme to tax a manufacturer to build a State factory intended to be a rival of his own. There is, however, a still more serious objection to State management, which is well illustrated in the case of the telegraphs. A State monopoly is a much more impregnable affair than one which is in the hands of an individual. A's monopoly of his invention may be rendered innocuous any day by B's patent of a new improvement; not so if A is the State: the case is then reversed, and B's improvement may be rendered comparatively useless by the fact that the State, having complete control of the market, may not care to take the trouble of adapting its methods to the improved facilities, and may, to save the public purse from the expense involved in making a change, discountenance the new invention. In every country in which the telegraphs are not under State management, the telephone has achieved a far higher development than it has with us, and the reason is alleged to be that Government has been chary of granting powers in favour of a system of communication which might prove a dangerous rival to the Post Office telegraphs. Similarly there can be no doubt that the speed of British trains, as compared with continental ones, is largely if not entirely due to the persistence with which competing lines look out for every improvement in the machinery of locomotion. On the other hand, competition often means defective system, with all the inconvenience entailed by failures in through-booking, the weary impatience of long waits at junctions, and the midnight horrors of a "change." The necessity for cutting out a competitor leads to disregard of public convenience. Apart from State interference, the only remedy for this defect is the "amalgamation" of the competing companies, a consummation which is not likely to be attained unless the strife has been protracted and intense, and threatens to end in the defeat of neither party, or in the ruin of both, like the ever-memorable conflict of the Kilkenny cats. Amalgamation, therefore, if a remedy at all, comes late, and only after

the public have been subjected to the maximum of inconvenience. But amalgamation has its drawbacks as well as its advantages: in eliminating the evils of competition it intensifies those of monopoly. The rival companies no longer seek to play the game of "beggars my neighbour," but are only too likely to unite in black-mailing the public, and the gain in increased convenience may be more than counter-balanced by the loss in the shape of increased fares. The same reasoning would then have to be applied to railways as to gas and water companies in relation to local governments, namely, that monopolies had better be managed by the community for its own advantage than by private individuals for their own profit. The Railways Act of 1844 contemplates another method of dealing with this difficulty, which does not promise either *à priori* or in practice to be of much use. The Act provides that if after twenty-one years from the date of the passing of the Act for the construction of any future railway, the clear profits divisible on the subscribed and paid-up capital shall be or exceed 10 per cent., the Treasury may revise the scales of fares and rates in such a way as to keep the clear profits down to a 10 per cent. limit. But if such a provision were ever to be put in operation, the result would be to deprive the community of the only advantage which private enterprise secures to it above State management, namely, the certainty that public convenience will be consulted in the hope of higher profits; and it is, besides, very unlikely that this provision can ever become generally applicable to British lines, owing to the high rate of profit at which State intervention is invoked. British railways at present, for example, do not pay more all over than about $4\frac{1}{2}$ per cent. Yet, in view of the risks involved in such a business as the carrying trade, it would not be fair to fix any other than a high rate at which the State might interfere, otherwise the original investors might not have time to recoup outlay and get compensation for long and unremunerative delay.

But probably the most weighty consideration against State acquisition and management of the railways is the difficulty of getting public servants animated with public spirit. It is almost impossible in this case to reconcile private interest with public advantage; in proportion as the former is served, too often the latter suffers. Who has not been irritated by the cynical indifference of the Government official to his public duties, his routine without method, his observance of the letter without regard for the spirit? Nominally a servant of the public, he soon finds himself one of its masters, but owns his dependence on the good opinion of his chief, in whose good graces he spares no pains that he may firmly stand—an unpleasant phase of human character—but of such is a Government department, and it tends to become an Augean stable accordingly. Government has not only to perform its functions on behalf of human beings, with all their imperfections, but has also to use such human beings as its instruments.

THE ROYAL COMMISSION ON LOSS OF LIFE
AT SEA.

PART I.

THE importance to this country of its shipping industry cannot be over-rated. Our national wealth is in no small measure due to the practical monopoly we were fortunate enough to obtain of the carrying trade of the world ; and, more important still, it was the existence of our mercantile marine that both necessitated and made possible that naval superiority which we still retain. All this, however, was not brought about without strenuous effort, and in the face of difficulties of no ordinary kind. The Dutch, not so very long ago, were the great carriers of the world, and very effectually disputed Britain's title to be mistress of the seas. Their power had to be thoroughly broken before ours could be made secure, and this was done perhaps not more by the enterprise of our merchants and the skill and daring of our sailors, than by the well-known Navigation Laws. Opposed as he was to Government interference with industry, Adam Smith had no hesitation in maintaining that "defence is of much more importance than opulence," and the Act of Navigation, which he describes as "perhaps the wisest of all the commercial regulations of England," is actually used by him as an illustration of the first of the two cases where alone, in his opinion, it may be advantageous to throw some burden on foreign, for the encouragement of domestic, industry. The fundamental purpose of these laws, it has been well said, was "national defence, the creation of a body of skilful and hardy seaman in the mercantile marine—the seminary from which the supply of our sailors for the navy was drawn, the augmentation of the shipping actually in the possession of natives of this country, and the encouragement of the skill and industry of our own ship carpenters." It was sought to secure these ends by excluding from both our colonial and our coasting trade all ships not British built and British owned, while a special and very deadly blow was dealt at the carrying trade of our rivals the Dutch, by prohibiting the importation of nearly all foreign goods save either in British ships or in ships of the country where they were produced, and even then only from that country direct. And having thus done what it could to protect our mercantile marine against foreign competition, the Legislature wisely left it very much alone to grow and prosper as best it might. Ship-builders, shipowners, underwriters, and seamen were supposed to be able to take care of their own interests, and they were allowed to do so without interference from the outside.

With the triumph of the Anti-Corn Law League, and the spread of what are termed Free Trade opinions, it no longer

appeared proper to those in authority that the State should concern itself about the prosperity of its mercantile marine. The Navigation Laws were accordingly repealed, and foreign ships permitted to trade in every respect as freely as our own. It was indeed found desirable to pass certain Acts regulating the registration of British ships, and the acquisition and transmission of property therein, the creation of burdens on shipping property and kindred matters, but otherwise the shipping industry was left severely alone. Of late years, however, all this has changed and it has been receiving its full share of that special kind of legislative attention which is so characteristic of the present day, and which by different classes of minds is viewed variously as a blessing and as a curse. This is not the place for discussing the merits and defects of the policy of *laissez faire*. But it may be stated as a fact that the interests of one or more of the different classes of persons engaged in an industry have very frequently become objects of concern to those who would deem it improper or at all events unnecessary to concern themselves with the interests of the industry as a whole. And in the present case the fostering care which, as has been pointed out, the State used to bestow on the shipping industry, with the view of securing it against foreign competition, has been transformed into care for the well-being of our seamen, and a consequent series of attempts to improve their condition and render their lives more secure. Shipbuilders and shipowners are presumed to be able to look after themselves,—merchants to be able to protect their interests by insurance, underwriters by the exercise of sound judgment and by the division of risks. The seaman alone is viewed as standing in need of protection, and protection not against the diminution of his earnings by the wholesale employment of foreigners, but against the machinations of his employers. Such is the gist of the new policy which, for good or evil, has taken the place of the old.

To go back no further than 1874, the Royal Commission on Unseaworthy Ships, which had been sitting for some time, in that year presented a report, which was followed up without delay by important legislation. In 1875 a temporary Act was passed, and this was succeeded in 1876 by a permanent enactment. The criminal law was strengthened against those who should be responsible for sending vessels to sea in an unseaworthy condition; the powers of the Board of Trade were increased, so that it might detain vessels believed to be unsafe; and the Wreck Commissioners' Court was instituted to render investigations into shipping casualties more speedy and effectual. More recently, there has also been special legislation on the subject of deck and grain cargoes, while more than one Bill has been introduced, which, if carried, would have produced important changes on the law of marine insurance.

A material diminution in the loss of life and property at sea

did not, however, appear to result from all these well-intentioned efforts. Indeed, so far as the Board of Trade statistics are authoritative, they went to show that between 1874 and 1883 losses at sea had increased rather than diminished in number. Mr. Joseph Chamberlain, who was President of the Board of Trade, accordingly introduced a Bill intended to mitigate the evil. His proposals, however, were crude and somewhat extreme, and they roused such strong and determined opposition that the measure was withdrawn, and in November 1884 another Royal Commission was appointed. The instructions of this Commission were to inquire into the extent and cause of the loss of ships and lives at sea since the report of the Commission on Unseaworthy Ships, and to report on the remedies for such losses, having special but not exclusive regard to the following subjects, viz. The laws concerning marine insurance and the liability of shipowners; the functions and the administration of the marine department of the Board of Trade; the functions of the Courts before whom wreck inquiries are conducted; the condition and efficiency of merchant officers and seamen, and the best means of improving the same. The Commission itself was a strong and fairly representative body, and, after a prolonged and elaborate inquiry, it submitted its final report last autumn. Considerable difference of opinion appears to have existed among the Commissioners, both as to matters of fact and as to the recommendations to be made; and although the report is signed by the whole Commissioners with one exception, the assents of a considerable and, on various grounds, very important minority are materially qualified by a couple of riders to the report, and by their adoption of an able and elaborate paper prepared by one of their number (Mr. Warrack, the representative of the Clyde shipowners), which distinctly traverses the formal report, and which is printed in the appendix thereto.

By far the greater portion of the report is taken up with a statement of the Commissioners' findings as to the extent and causes of the loss of life and property at sea, and the remedies they suggest,—their views as to the "condition and efficiency of officers and seamen of the merchant service" occupying only a couple of pages. The Commissioners had at the outset to face the fact that the very stringent Act of 1876 had proved itself quite inadequate to check the evil, and accordingly the causes of its failure are discussed at considerable length. To begin with, section 4, which made it a misdemeanour to send a ship to sea in an unseaworthy condition, has, through the difficulties attending its enforcement, been practically a dead letter. Although there were over 200 cases up to the end of 1884 where the Board of Trade officials considered that there were *prima facie* grounds for instituting proceedings under this section, they finally found themselves able to prosecute in only fourteen cases, and in only three of these were convictions

obtained. This result is not due to any vagueness in the wording of the section, or to its effect having been limited by judicial interpretation. It is due, in the Commissioners' opinion, partly to the fact that juries shrink from giving verdicts against shipowners where the offence proved is constructive rather than actual, where there is an absence of proof of deliberate individual or gross negligence, and where the shipowner has delegated the duty of looking to the seaworthiness of the vessel to the master or shipwright, although such a course does not legally relieve him from responsibility. But it is due in much greater measure to the existence of other sections of the same Act, which authorized the detention by the Board of Trade of vessels which there appeared reason to believe were unseaworthy. A jury is of course inclined to the view that as the exercise of this power would have prevented the commission of the alleged offence altogether, its non-exercise is either conclusive proof that the vessel was not unseaworthy, or at any rate justified the shipowner in sending it out, under a reasonable belief that it was safe. In the words of the report, "The criminal remedy is made ineffectual by the concurrent detaining remedy, and it would appear that in such cases criminal liability and official prevention cannot efficiently co-exist."

The attempt at official prevention, too, was nearly as marked a failure. Not merely are the Board of Trade officials hampered by Courts of Survey and Appeals, but the Board is liable in damages for wrongfully detaining a vessel which a jury may find to have been in a seaworthy condition when detained; and this liability has made its officials very chary of interfering in many cases where their interference was no doubt required. These provisions, the Commissioners think, may indeed have at first driven off the register many unseaworthy vessels; but, on the whole, they have rather tended to lower the general average of seaworthiness than to raise it, and to mark out to negligent and ignorant shipowners the limits within which they can safely operate without being interfered with by the Board of Trade, and without being made liable to the criminal law. In short, the only part of the Act of 1876 which appears to have been of any practical use is that which provided for the institution of the Wreck Commissioners' Court; and the Commissioners declare themselves satisfied as to the benefit which the inquiries in that Court have produced, though they express the opinion that it might be well if that Court were one merely of inquiry, and not also possessed of penal jurisdiction.

By far the greatest number of shipowners are of course men of high character, who are only too willing to do anything in their power for the protection of their vessels, and of the lives of their seamen. But there seems, unfortunately, to be some reason for believing in the existence of a small minority who are not possessed of the same scruples, and who are either culpably negligent

or even entirely regardless of all considerations save their own individual profit, at whatever cost to other people that may be obtained. It was against this blameworthy minority that the legislation of 1876 was directed without effect. But for them it would never have been called for, and it is only with the view of checking their evil practices that any further legislation is required. The question, accordingly, which the Commissioners had to consider was, Whether it is possible to legislate effectually against this minority on the present lines, or whether an entirely new policy is alone likely to have the desired effect; and they are driven to adopt the latter alternative.

THE PAWNBROKERS ACT.

ALTHOUGH in theory it is never questioned that Scots law and English law are markedly distinct in genius, it is not always recognised in practice that it demands a knowledge of Scots law in order to qualify a would-be legislator for drawing Bills which are intended to effect changes in that law. Examples of the use of foreign technical terms in Bills and Statutes relating to Scotland are not far to seek. No Scotch lawyer would expect that an Act called the "Guardianship of Infants Act" had any bearing on Scots law, although he would discover that within the four corners of the Act considerable pains have been taken to secure that in Scotland "the word guardian shall mean tutor, and the word infant shall mean pupil." Mr. Haldane's Limited Owners Bill threatened to be another instance of "law in a foreign garb," but most fortunately he seems to have regarded it as inconsistent with his Home Rule tenets to persevere with a measure thus clad. Nevertheless it stands on record as an excellent example of the self-sufficient narrowness of many English lawyers, who, even though they be Anglicized Scotchmen, cannot conceive the inapplicability of English legal terms to any law known in the United Kingdom. Unless scrupulous care be exercised in securing that alterations on Scots law shall be couched in the language of Scots law, the result may be not only uncertainty and needless litigation, but even the neutralizing of the benefits intended to be conferred.

We propose to illustrate this from the Pawnbrokers' Statute of 1872 (35 and 36 Vict. c. 93), the consolidating Act which now regulates the business of pawnbroking. It is an English Act, with a section appended (section 56) regulating the application of the Act to Scotland,—not usually a very satisfactory method of legislation. In the present instance the main provisions of the applying section are directed towards the definition of the term "Court of summary jurisdiction" in the application of the Act

to Scotland. So lucidly has this been done, that one may safely offer to defy any Scotch lawyer to say what the definition means. Apparently the further result also is attained, that one at least of the provisions of the Act (as will subsequently be shown) may successfully be evaded.

In construing the expression, the first thing to do, in view of the structure of the Act, is to ascertain what the term "Court of summary jurisdiction" means in England. Section 5 of the Pawnbrokers Act defines it as "any justice, justices, or magistrate (however designated) having jurisdiction under the Summary Jurisdiction Act of 1848." On turning to the Summary Jurisdiction Act, one finds that it confers certain powers upon justices of the peace, police magistrates, and the like, not only in the matter of offences which entail fine or imprisonment on summary conviction, but also in respect of complaints upon which such justices "have authority by law to make any order *for the payment of money or otherwise.*" It is thus at once obvious that this Act has a much wider purview than the Scotch Summary Procedure Act of 1864. The English Act deals with the wide summary jurisdiction, civil and criminal, of the English Justice of the Peace Court, which pronounces convictions upon informations, and orders upon complaints. Under the Pawnbrokers Act this double jurisdiction is called into play. There is an exhaustive enumeration of the offences against the Act which may be committed by pawnbrokers or by pawners, entailing penalties pecuniary or otherwise. This is a quasi-criminal, or at least a penal, jurisdiction. But the Pawnbroking Act also confers a jurisdiction which is essentially civil upon the "Court of summary jurisdiction." For example, section 28 provides that, "if a person entitled and offering to redeem a pledge, shows to the satisfaction of a Court of summary jurisdiction that the pledge has become, or has been rendered, of less value than it was at the time of the pawning thereof, by or through the default, neglect, or wilful misbehaviour of the pawnbroker, the Court may, if it thinks fit, award a reasonable satisfaction to the owner of the pledge in respect of the damage, and the amount awarded shall be deducted from the amount payable to the pawnbroker, or shall be paid by the pawnbroker (as the case requires), in such manner as the Court directs." This clause obviously provides a simple and summary process for a particular class of actions of damages. Again, section 30, after giving a discretion to the Court as to the disposal (1) of goods unlawfully pawned, and (2) of stolen goods pawned, in any case in which a conviction has been obtained, proceeds to enact: "(3) If, in any proceedings before a Court of summary jurisdiction, it appears to the Court that any goods and chattels brought before the Court have been unlawfully pawned with a pawnbroker, the Court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to

the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the Court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting." This provision seems to be intended to meet the case where the criminal has escaped justice, and the question as to the destination of the goods has to be determined between the owner and the pawnbroker. These, then, are examples of powers conferred by the Act upon the Court of summary jurisdiction, which are in their nature essentially civil and not criminal.

Having considered the duties of the Court of summary jurisdiction under the Pawnbrokers Act, and having seen the suitability for these purposes of the English Court to which the Summary Jurisdiction Act of 1848 applies, we have now to consider what the Court of summary jurisdiction is to which pawnbrokers are subject in Scotland. Section 56, sub-section 1, provides that in the application of the Act to Scotland, "Court of summary jurisdiction shall mean any sheriff, justice or justices of the peace, or magistrate, by whatever name called, *to proceedings before whom* the provisions of the Summary Procedure Act 1864 may be applied." A reference to the last-mentioned Act shows that it applies to Sheriff Courts, Burgh Courts, J. P. Courts, and Police Courts. The question thus arises, whether the Court under the Pawnbrokers Act is simply the Sheriff Summary Court, or the J. P. Court, or the Police Court, or whether the phrase, "*to proceedings before whom*" (italicised above), is intended to convey a wider meaning. This somewhat clumsy phrase stands in striking contrast to the directness of the passage quoted above from section 5 of the Act, in which the corresponding expression is "having jurisdiction under." One is forced to conclude that there was a reason for varying the phraseology in the second case (*i.e.* in clause 56). Probably the reason was this:—The Summary Procedure Act of 1864 is "an Act to make provision for uniformity of process in summary criminal prosecutions and prosecutions for penalties in the inferior Courts in Scotland." But from what has been said it will be clear that to provide a Summary Criminal Court was by no means sufficient for the purposes of the Pawnbrokers Act. Accordingly, section 56, sub-section 1, defines the judges who are to have jurisdiction, without specifying in what Court they are to exercise it. It is followed by sub-section 2—"The provisions of the Summary Procedure Act 1864 may be applied to all proceedings for the trial or prosecution for any offence, or for the recovery of any penalty, or *for the obtaining of any order* before a Court of summary jurisdiction under this Act." Sub-section 3 provides that the Court acting under the Act shall consist of two justices or magistrates, or one sheriff, or other such judge; while sub-section 6 gives the Court generally all powers necessary for the purposes of the Act.

The problem for the Scotch lawyer is to interpret these sub-sections in such a way that they will give us a Court which can exercise all the jurisdiction, civil and criminal, conferred by the Pawnbrokers Act. We may take the case of the Sheriff Court as typical, leaving out of account the J. P. and the Police Courts. In the matter of offences against the Act there seems to be no difficulty. The Sheriff Summary Court is obviously the proper Court for such prosecutions. But when the pawnbroking dispute is essentially a civil case, as under section 28 quoted above, the Sheriff Summary Court, as a criminal Court, is clearly not a Court suited for the decision of such a matter. There are no forms that we know of suitable for bringing such a question before the Sheriff Summary Court. It seems to have been a perception of this difficulty which led the framers of the Act to use the circumlocution, "to proceedings before whom," in section 56, sub-section 1 (quoted *supra*). They simply defined the judge who should have jurisdiction, without compelling him to exercise it in a particular Court, but permitting him (for we interpret sub-section 2 of section 56, quoted above, as permissive merely) to use the forms provided by the Summary Procedure Act of 1864. But if this interpretation be a sound one, then surely the "Court of summary jurisdiction" is entitled to find some competent method of exercising the civil jurisdiction which the Act confers. Clearly the summary procedure under the Debts Recovery Act or the Small Debts Act cannot be adopted without express enactment, but there is other summary procedure known to the Sheriff Court, even although "there are no authoritative decisions to say what summary proceedings in civil matters mean" (Dove Wilson—*Sheriff Court Practice*, p. 375). By the Act of Sederunt of 1839, actions of removing and aliment, and "all cases which require extraordinary despatch," may proceed before the Sheriff under summary application, while the Sheriff Court Act of 1853 permits summary procedure by consent of both parties. Now it appears to us that the only possible interpretation of the obscure provisions which we have quoted is to hold that the judge having jurisdiction under the Act, being directed to proceed in a summary manner, may do so in any Court in which he is entitled to sit in a method suitable to the nature of the particular case; that in criminal cases he may apply the provisions of the Summary Procedure Act of 1864; and that, while under the letter of the statute he may do so in civil cases also, the practical impossibility of this course implies that he may proceed in his ordinary Court in a summary manner.

No doubt this interpretation is open to the accusation of being somewhat strained, but it at least seems to be that which best meets all the requirements of the case, since it is the civil jurisdiction of the Court which creates the difficulty. Take the case of an action against a pawnbroker for the recovery of stolen goods

pawned with him. Under the old Pawnbroking Statute (39 and 40 Geo. III. cap. 99, sec. 13), provision was made for the search for and recovery of such goods after certain procedure, and it was enacted that upon identification the justice or justices should "thereupon cause the goods and chattels found on any such search, and pawned, pledged, or exchanged as aforesaid, to be forthwith restored to the owner thereof." In *Tweddel v. Duncan*, 3 D. 998, the question arose whether the procedure provided in this clause was imperative on those who wished to recover stolen goods, and the decision was that the statutory procedure was merely permissive, in no way infringing on the owner's right to proceed at common law. It will be noticed that section 13 of the Act of 1799 simply reaffirms the common law as to stolen property, recognising no right whatever in the pawnbroker. But the 30th section in the Act of 1872, part of which is quoted above, certainly modifies the absolute common law rule regarding stolen goods. The first two sub-sections of that section most clearly enact that where there has been a conviction for unlawfully pawning, or for feloniously or fraudulently obtaining goods which have been subsequently pawned, then the Court shall have an equitable discretion as to the terms on which the pawnbroker shall be ordained to deliver the goods to the owner. We are well aware that there are *obiter dicta* of English judges to the opposite effect in the case of the *Singer Manufacturing Co. v. Clark* (L. R. 5 Ex. Div. 37). That case turned upon the indemnity provided to pawnbrokers under section 25 of the Act, but in giving judgment Mr. Justice Hawkins remarked that "none of the provisions of the statute were intended to affect, nor do they affect, the common law right of an owner of property pledged against his will who claims by title paramount to the pawner." This view has also been adopted by Sheriff Berry in the recent case of *Hoey v. Biggar*, *Scottish Law Review*, 1887, p. 221. But neither of those cases directly touched the 30th section of the Act, and, with all deference to such authorities, it seems impossible to adopt so strong a view as Mr. Justice Hawkins expresses. We believe it is no uncommon thing for sub-sections 1 and 2 of section 30 to be put in operation in Sheriff Criminal Courts. Yet whenever this is done, following on a conviction for theft, it is an infringement of the common law rule regarding stolen property. It is legal for all that, and therein lies the proof that the Pawnbrokers Act does modify the common law.

It seems clear enough, then, in the case of stolen goods pawned, that if the thief be convicted, the Court convicting possesses an equitable discretion in the matter of fixing the terms on which the stolen goods are to be handed back to the owner. Take now the case of stolen goods pawned, when the thief escapes from justice. Who is to decide between the owner and the pawnbroker in this case? The discretion of the Court, according

to the Act, may be exercised "if in any proceedings before a Court of summary jurisdiction it appears to the Court that any goods and chattels brought before the Court have been unlawfully pawned with a pawnbroker." If there is no criminal, there can be no criminal proceedings; and by what procedure can owner or pawnbroker bring the matter before a "Court of summary jurisdiction"? Of course, if the interpretation suggested above be correct, the proper course would be to proceed by petition in the Sheriff Ordinary Court, under summary application in virtue of the Act of Sederunt of 1839. But, in a recent case, the Sheriff-Principal at Edinburgh indicated his opinion that he could not entertain an application under section 30 of the Act in the Sheriff Ordinary Court. It has already been pointed out that there is no procedure suitable for such a case known to the Sheriff Summary Court, and accordingly sub-section 3 of section 30 must, in the Sheriff Court at any rate, remain a dead letter, unless a broader interpretation be given to the expression "Court of summary jurisdiction," as we have suggested.

The object of the 30th section is perfectly plain and commendable. It is to extend to theft, in the discretion of the Court, the rule that "of two innocent parties, one of whom must suffer, the party whose actions enabled the fraud to be committed must suffer the consequences" (*Brown v. Marr, etc.*, 7 R. 427). Many cases of pawning stolen goods would never occur but for the carelessness of the owner, and the 30th section empowers the Court in such a case to deal equitably with the parties concerned. It might be grossly unfair to restore the goods to the owner, making the whole loss fall upon the pawnbroker. Such unfairness the Legislature empowered the Court to remedy. But if it is to be held that in Scotland the Sheriff can exercise this discretion only when he is sitting in the Sheriff Summary Court, either some procedure will have to be provided in that Court to meet cases in which there has been no conviction, or we shall have the startling alternative that it will be for the interest of the owner of the stolen property that the thief should not be convicted. For, if the thief be convicted, then the Court's discretion may be exercised, but if there be no conviction, the owner of the stolen goods need only re-vindicate them by action in the Sheriff Ordinary Court. There he must obtain decree, since the discretion of the Court is there excluded. Even if a form of application to the Sheriff Summary Court were invented, an owner might dodge the provisions of section 30, by hastening to bring his petition in the Ordinary Court, so that in the Summary Court he could plead *lis alibi pendens*.

It is pretty clear that there is some defect here. It cannot be held that a remedy is to be extended or not, according to the Court which one party or the other is clever enough to invoke. No more can the law be interpreted so as to put the owner of

property stolen and pawned in a better position if the thief escapes, than he would be in if the thief were convicted. No doubt the Pawnbrokers Act is one which does not directly concern a very large number of people, but whether or not the defects in the Act call for speedy amendment, it seems to afford an excellent example of the evil effects of carrying through a change on Scots law by appending a clause to an English Act.

LAWS RELATING TO SUNDAY.

SOME years ago, in an article on this subject (see *Journal of Jurisprudence*, 1876, vol. xx. p. 67), the old Acts of Parliament by which our forefathers sought to enforce the day of rest were recounted, and decisions commented upon which had up to that time been pronounced by our Courts. It is not now intended again to go over the same ground. But since that time the question of the extent to which the law of Scotland enjoins cessation from all kinds of labour on the Sabbath has been again before the Courts in various forms, and it is proposed now to further develop the subject by reference to these cases, and to ascertain, if possible, the present state of the law upon it. It is a curious circumstance, as bearing upon the reputation of Scotland for Sabbath observance, that no conviction appears ever to have been obtained in our Courts for an offence against any of the numerous statutes which were passed between 1503 and 1701 for the prevention of Sabbath desecration. Attempts have been made to do so, but they have invariably failed. But until recently it has never been suggested that the Sabbath Desecration Acts were in desuetude, or ought not to be enforced; while in the civil Courts the spirit of them has been uniformly assented to. So far as the administration of the law is concerned, the country appears to halt between two opinions—leaving on the statute book, on the one hand, severe penalties against Sabbath breaking, while invariably declining, on the other, to enforce the sanction of the Acts, and leaning as far as possible in favour of individual liberty in the matter. Such a condition of things, it may very well be said, is, in one sense, not unsatisfactory, if its continuance could only be secured undisturbed. But both in the criminal and civil Courts cases from time to time occur in which it is necessary to determine how far, and in what degree, Sabbath observance is still part of our municipal law. Seventeen years ago, in the case of *Bute v. More*, 1870 (9 M.P. 180, and 1 Couper 495), it was unanimously held by a full bench of the Justiciary Court that the Sabbath Desecration Acts were not in desuetude, in respect that although the penalties provided by them might not have been recently inflicted, there was no practice contrary to their spirit or

intention. A distinction was, no doubt, taken in that case by some of the judges between the different Acts. Thus Lord Deas, in the course of a critical examination of the whole code of laws relating to Sabbath observance, observed with reference to the oldest of them (that of 1579, c. 70), "I rather suppose it would startle a good many people, including, perhaps, some of my brethren now beside me on the bench, to be told that they were liable to be fined or set in the stocks for breach of this enactment in the Statute of 1579, because that Statute stands unrepealed in the Statute Book, and the House of Lords have held another part of it to be in full force." The breach to which his lordship refers is the "wilfully remaining from their parish kirk in time of sermon or prayers on the Sabbath day;" and the sanction is, that the offender shall pay twenty shillings, and, failing immediate payment, "be put and holden in the stocks, or sik uther engine devised for public punishment, for the space of twenty-four hours." While his lordship, however, thus relieved the mind of the College of Justice in regard to one of the prohibited offences, he concurred with his brethren in holding the Acts to be *in irride observantia* in respect of the offence dealt with in the particular case, viz. that of keeping open shop on Sunday. The principle of the decision, already indicated, was also fully explained by some, and concurred in by all, of the judges. In the recent case of *Nicol v. McNeill*, however, 13th July 1887 (14 R. Just. 47, and 1 White 416), which was a suspension of a conviction of the very same offence as that tried in *Bute v. More*, considerable doubt seems to have been entertained regarding the soundness of the decision in the latter case upon the question of the desuetude of the Sunday Acts, and the observations then made from the Bench tend to impair the authority of that part of the judgment. The two cases were alike in subject-matter and in result: the conviction in each instance being suspended upon a point of procedure—the complaint being held incompetently laid under the Summary Jurisdiction Act of 1864. But in *Nicol v. McNeill*, both during the discussion and at advising, the tendency of opinion upon the bench seemed to be against affirming the non-desuetude of the Sunday Acts. At advising, Lord McLaren observed, "That while opinions of great weight were offered on this question in the case of *Bute v. More*, I conceive it to be a question entirely open to consideration; no decision having yet been pronounced upon that question. I wish to reserve my opinion on it, because in point of fact the statute has not been enforced within living memory, and the public opinion of the country does not demand its enforcement. These, it may well be argued, are the conditions for the tacit repeal of a statute, in conformity with the ancient Scottish constitutional doctrine." Lord Young's criticism of *Bute v. More* was as follows: "We were also referred to that case as containing very strong and distinct expressions of opinion by the learned

judges who took part in the decision, that the Act of 1661 was not in desuetude, but was in observance; of course the decision being that the whole prosecution was inept, there could be no decision *ultra* upon the question whether the Act of 1661 was in desuetude or not. Nevertheless the opinions expressed by the learned judges, although in a case which was dismissed as inept, upon a question which would have presented itself had the proceedings been regular, are of the greatest possible value, and entitled to the greatest possible respect; still there was no decision, nor could there be; and the weight and respect due to an expression of opinion by the learned judges is of a different order from the weight and respect which is due to a judgment." Now it is inconsistent with the decision in *Bute v. More*, appearing in the Law Reports to represent that part of it which affirmed the observance of the Sunday Acts as merely *obiter*. All the judges of the Justiciary Court, except one, delivered opinions at considerable length upon the case, and each of them dealt expressly in the beginning of his opinion with this question, and professed at all events to deliver a judgment upon it. No doubt each of them went on to consider a second ground of judgment, upon which they were also unanimous, and which was necessary for the final disposal of the case. But in order to arrive at the consideration of the second ground, viz. the question of procedure, they required first of all to come to a conclusion on the first, viz. whether or not a relevant charge could be made of a contravention of the Sunday Acts? If they had been of opinion that these statutes were in desuetude, and that consequently the appellant could not have been relevantly charged with a breach of them, there would have been no need to consider whether or not the complaint was properly libelled under the Summary Procedure Acts. The judgment no doubt was, as Lord Young remarks, that the whole procedure under these Acts was inept; but in order to reach that result, a decision in favour of the observance of the Sunday Acts required to be, and was, pronounced. In point of fact, but for the decision in favour of the relevancy of the libel, there could have been no further judgment upon the propriety of the procedure, and it therefore seems impossible to accede to his lordship's observation, that "the decision being that the whole prosecution was inept, there could be no decision *ultra* upon the question, whether the Act of 1661 was in desuetude or not."

The non-desuetude of the enactment against keeping open shop on Sunday having thus been authoritatively laid down in 1870, it remains to be considered whether, after the interval which has elapsed since then, the law would now be held to be to the contrary effect. In *Nicol v. M'Neill*, Lord Young thought the question, which he described as "one of the greatest possible importance," to be "not unworthy of reconsideration by the Court;" and Lord M'Laren, in the passage quoted above from his opinion, indicates

the grounds on which it might be maintained that the law is now changed. These are, first, that the statute under which both those cases arose has not been enforced within living memory ; and, second, that the public opinion of the country does not demand its enforcement. The first may be conceded without question, and it may be further admitted with regard to the second that public opinion does not demand, and would not at all favour, a series of prosecutions resulting in the fine or imprisonment of the small shopkeepers who keep their places of business open on Sunday in the cities and towns of Scotland. But are these two conditions all that is necessary for the tacit repeal of a statute according to ancient Scottish constitutional doctrine ? Stair (i. 1. 16) describes our statutes as “in this inferior to our ancient law, that they are liable to desuetude, which never encroaches on the other. In this we differ from the English, whose statutes of Parliament, of whatsoever antiquity, remain ever in force till they be repealed, which occasions to them many sad debates (public and private) upon old forgotten statutes.” But in order to establish the desuetude of a statute it must be shown, to use the words of the Lord Justice-General in *Bute v. More*, “not only that for a long period of time no punishments have been instituted under it, but that the offences which are there visited with penalties are in use to be committed flagrantly and openly without the penalties being inflicted.” In that case the judges were all of opinion that the offence there charged of keeping open shop on Sunday was one perfectly well known to the law, not practised openly, and not recognised as a legal or proper proceeding. The country has advanced since then, but our manners and customs have scarcely yet changed in this respect so far as to enable the contrary of these propositions to be judicially affirmed. The principle upon which a statute may be held in desuetude was, we venture to think, more fully laid down by Lord Neaves in *Bute v. More*, thus :—“All law has its origin in national consent, and requires the like consent to its abrogation. It is not evidence of such consent that the statutes in question have latterly been seldom or never enforced, unless it can be said, which cannot here be done, that the things prohibited have been openly and extensively practised.” In the recent case of *Gairns v. Main*, decided in the High Court on 16th March 1888, the subject of Sabbath disturbance was again incidentally dealt with. A cabman had been convicted of a breach of the bye-laws passed by the burgh of Leith for regulating licences granted by them under the powers of the General Police Act of 1862 to hackney carriages plying within the burgh. The offence consisted in driving at too rapid a rate past a church in the burgh during the hours of divine service, to the disturbance of public worship. The conviction was quashed, on the ground that the bye-law did not apply to the offender, who was an Edinburgh cabman, and was

itself merely part of the general system of licensing established by the Act, and only a branch of the licence granted. It does not appear to have been contended that the regulation against driving quickly past churches during public worship was in itself *ultra vires* of the magistrates; indeed, as one of the judges remarked, the bye-law was a very proper one, and the cabman ought to have obeyed the policeman who attempted to make him observe it. Had he been licensed by the Leith magistrates, the more generally interesting question might have been raised, How far these authorities were entitled, under the powers conferred on them for the regulation of cab traffic, to legislate indirectly in favour of Sabbath observance. That or a similar question has occurred occasionally in the Sheriff Courts in connection with the powers of Harbour Commissioners to regulate the use of the harbour by means of bye-laws. Under the Harbours, Docks, and Piers Clauses Act, 1847, they are authorized to pass bye-laws for, *inter alia*, regulating the use of the harbour, provided these are not repugnant to the laws of the kingdom in which the harbour is situated, nor contrary to the provisions of the private Act under which the harbour is managed, and are approved of by the Sheriff before they come into operation. Some years ago the Commissioners of the harbour of Perth, supported, as was said, by "all the piety" of that town, passed a bye-law for the purpose of excluding passenger steamers from Dundee entering the harbour on Sundays. The then Sheriff (now Lord Adam) declined to sanction the bye-law, holding that, as the harbour was a public one, it could not thus be closed by the Commissioners. In the case of the Burntisland harbour, however, the Sheriff of Fife allowed a bye-law providing for a similar exclusion; and recently this judgment has been followed by the Sheriff-Substitute of the same county in regard to the harbour of Kirkcaldy. There the proposed bye-law was vigorously objected to by certain steamboat owners in Leith, who have lately developed a considerable Sunday traffic in the Firth of Forth, and who made every effort to induce the Sheriff to disallow the bye-law, but without success. We observe that they have since then brought a reduction of the bye-law in the Court of Session, in which an important decision on the legality of Sunday traffic may be looked for. The argument which prevailed with the Sheriff-Substitute apparently was, that it was not repugnant to the law of Scotland to limit or regulate Sunday traffic, and that the bye-law, as it stood, was not contrary to the Kirkcaldy Harbour Act. The case will be presented in the Supreme Court in a somewhat different aspect, as it will no doubt be contended that the bye-law is *ultra vires* of the Harbour Commissioners; but if the tests of their powers are as above stated, reduction of the bye-law must in effect affirm that Sunday traffic is not repugnant to the law of Scotland. In England, where ideas on the subject are generally supposed to be less strict, it has been

held (*Calder and Hebble Nav. Co. v. Pilling*, 3 Railway Cases 735) that a company who had by Act of Parliament charge of a public canal were not entitled to close its navigation on Sunday; and there is much to be said for laying down a similar rule in Scotland with regard to a public harbour. But to close it against Sunday traffic of a particular and objectionable kind, appears *prima facie* to be in consonance both with the law and the public opinion of this country. At all events, it will be regrettable if any decision which may be come to should derogate from the eloquent summation of our law on the subject by Lord Ardmillan (*Bute v. More supra*): "The enforcement of the religious duty of observing the Sabbath is beyond the reach of human law. The spring and source of such observance must be within the heart and conscience. But to those who are willing to fulfil this duty our Scottish law affords protection by securing to them the privilege and opportunity of a quiet and orderly day."

Obituary.

THE LATE MR. JOHN CLERK BRODIE, W.S.

THE death of this gentleman is announced as we go to press. Mr. Brodie died on the 27th ult. at his residence in Edinburgh. We extract the following appreciative notice of the deceased, who was for many years a leading member of his branch of the profession, from the columns of a contemporary.

John Clerk Brodie, C.B., LL.D., senior partner of the firm of John Clerk Brodie & Sons, Writers to the Signet, Edinburgh, was born on 20th May 1811. He was fourth, and youngest, son of the late Thomas Brodie, W.S., who for many years held an official appointment in connection with the House of Lords, and brother of the late James Campbell Brodie of Lethen and Coulmony, in Nairnshire. Mr. Brodie's earlier education was acquired at Westminster, where he was a King's scholar for a period ending in 1827, after which he attended the University of Edinburgh, where he took honours in mathematics, but specially devoted himself to the study of law. Admitted as a Writer to the Signet in the year 1836, Mr. Brodie, fortunate in possessing a retentive memory as well as an acute and powerful intellect, soon showed the stuff of which he was made, and, by a rare union of patient industry and quickness of perception, placed himself at a comparatively early age in the front rank of his profession as a successful lawyer and conveyancer. At the age of thirty-six he received, on the nomination of Lord Advocate Rutherford, the appointment of Crown Agent for Scotland, which he held from February 1847 to March 1852; reappointed

to that office in January 1853, he held it to 1855, and from thence to 5th March 1858. In the capacity of Crown Agent during that long period, Mr. Brodie rendered valuable aid in the initiation and, in not a few instances, by the drafting of a series of statutes now in operation, which marked a new and beneficial departure in the law of Scotland relating to land rights. Of these statutes perhaps the principal are the Transference of Land Act, 1847; the Service of Heirs Act, 1847; the Heritable Securities Act, 1847; the Crown Charters Act, 1847; and the Rutherfurd Act of 1848, which last made the first breach in the ancient feudal fortress of the law of entail, by enabling heirs of entail in possession, with consent, to disentail their estates and acquire them in fee-simple.

In the year 1858 Her Majesty conferred on Mr. Brodie the offices of Principal Keeper of the General and Particular Registers of Sasines, etc., for Scotland. In the discharge of the duties of these offices, Mr. Brodie was instrumental in bringing into operation some improvements of much value to the public. In such an establishment as the Register of Sasines, it is of great importance to secure facility of access to the records, for the purpose of tracing the links of transmission of, and the burdens on, landed property. Mr. Brodie, recognising this, adopted an improved principle for the more expeditious preparation of the abstracts of writs given in for registration, and for the more easy searching of the indices of these abstracts; and, by assiduous and painstaking supervision, he has so successfully carried into operation these and other beneficial changes, that little is now wanting to make the Department as perfect as need be. To the general utility and efficacy of the Scottish registration system, Mr. Brodie's work has in a great measure contributed.

Mr. Brodie was elected by the Society of Writers to the Signet to the office of its Treasurer, one of the very few appointments in the gift of the Society itself, and this he held for several years, till, in the beginning of the year 1882, the office of Deputy-Keeper of the Signet was conferred on him, which latter post he held concurrently with his appointment as Keeper of the Registers of Sasines, etc., from that time till the beginning of the present year, when he felt that the state of his health (which for some months previously had been very uncertain) required him to resign. As Deputy-Keeper of the Signet Mr. Brodie did some good work, which has left its impress on many of the public statutes of recent years. To his professional brethren his always courteous manner was as genial and kindly as it could possibly be, consistently with a due sense of the dignity of his office. No better testimony of this could be wished than that of the Commissioners of the Society of Writers to the Signet, who, at a meeting held on 20th December last, unanimously passed a resolution in which the following passage occurs:—

"The Commissioners having been made aware of the resignation of Mr. John Clerk Brodie, C.B., LL.D., in consequence of the state of his health, of the office of Deputy-Keeper of the Signet held by him, desire to express their sincere regret for the cause which has led him to resign an office which he has so ably filled, and the duties of which he has so assiduously and successfully discharged, as well as the high appreciation of the services which he has rendered to the Society, and their deep sense of the loss which they have sustained in being deprived of his guidance and counsel in the management of the affairs of the Society, in which he took so great an interest, and whose advantage he was always ready to promote to the best of his power. They further desire to express the high respect and esteem which they entertain for Mr. Brodie, both personally and professionally—a feeling which is shared by all who know him—and to acknowledge the uniform kindness and courtesy which marked his intercourse with every member of the Society."

Mr. Brodie was a Deputy-Lieutenant of Forfarshire, in which his estates are situated, and with which district he had an old family connection through the Brodies of the Burn. In his earlier years he took a good deal of interest in the affairs of the counties of Nairn and Moray, in which the estates of his family are situated, and we find him at one time acting as President of the Edinburgh Morayshire Club.

Latterly his personal attention has necessarily been more or less concentrated on Forfarshire, in connection with the administration of which county he took much interest. As a country gentleman and proprietor he was highly respected, and his services and counsel at local meetings were much sought after and heartily rendered. He did not throw himself prominently before the public or into the political arena. His inclinations were all the other way. Recently, however, the action of the extreme Disestablishment party in the Free Church (of which communion he had been a member since the Disruption in 1843) induced him to appear more than once in the General Assembly of that Church, and in public meetings, in support of the Establishment principle, on which he, in common with many other eminent Free Churchmen, such as Lord Moncreiff, held that the Free Church's constitution rests. Mr. Brodie was a representative elder of the Church at the Disruption, and signed the now famous Protest of the Free Church.

At the Ter-centenary of the University of Edinburgh, Mr. Brodie was made an LL.D. of that University; and, in recognition of his services in the improvement of the public registers, the Queen about two years ago created him a C.B.

Mr. Brodie was twice married. In 1832 he married Miss Bathia Garden Souter, eldest daughter of Mr. Stewart Souter,

Melrose, who died in 1844, and by whom he had an only son, Mr. Thomas Dawson Brodie, W.S., who has been for about thirty years his active partner in business. In 1848 he married Miss Penelope Marianne Sneyd, third daughter of the Rev. John Sneyd, M.A., of Basford Hall, Staffordshire. By this second marriage he had a large family, of whom, however, only two daughters survive.

Reviews.

The Sources of the Law of England. An Historical Introduction to the Study of English Law. By Dr. H. BRUNNER, Professor in the University of Berlin. Translated from the German, with a Bibliographical Appendix, by W. HASTIE, M.A., Translator of Kant's *Philosophy of Law*, *Outlines of the Science of Jurisprudence* by Puchta, etc., etc., Edinburgh: T. & T. Clark.

PROFESSOR BRUNNER's short synopsis on *The Sources of the Law of England* has been well translated, and admirably edited, by Mr. Hastie. The excellence and usefulness of the original work cannot be questioned, and British students are indebted to Mr. Hastie for enabling them to read it in their own language. It is a model of conciseness. As the translator says in his preface, "Its clearness, its erudition, its comprehensiveness, cannot fail to be recognised. It embodies matter which might easily have been expanded into a considerable volume, but it is presented in such a succinct and perspicuous form that the student may rapidly master it." The first section deals with the Anglo-Saxon law, which, it is remarked, though interrupted in its development by the Norman Conquest, has maintained itself in part alongside of the Norman innovations, and has entered with them into the foundations of the present political and legal constitution of England. It is to be noticed that Dr. Brunner does not deal with the Roman law as one of the sources. He holds the view that the purely German character of the Anglo-Saxon law "was not at all influenced by the Roman law." Neither does the author treat of the laws of the ancient Britons; but Mr. Hastie has added a short summary on the ancient laws of Wales and of Ireland, and the more scanty traces of the system of justice obtaining among the Picts and Scots. The second section is devoted to the Anglo-Norman law, under the heads of Statutes, Judicial Sources, and Juristic Literature. Section third treats of the law from the fourteenth century to the time of Blackstone. At the end of each section is a reference to the literature bearing on

the period. Throughout Mr. Hastie has supplied many useful notes, mainly illustrative passages from Stubbs, and has supplemented the references to the literature of the several periods. There is an appendix by Mr. Hastie, in the form of a bibliographical guide to the study of the law of England as it exists at present. This, of course, is a subject on which men will differ. It is the age of "books which have influenced me," and "list of the hundred best books," and in regard to these there is a vast variety of opinion. On the whole, however, it may be said that the list is a good one. It contains the best works, though one is a little surprised to find certain works in it,—such as Shearwood's inaccurate Abridgments, for example.

Giacomo Muirhead. Storia del Diritto romano dalle origini a Giustiniano. (Corso completo ad uso delle Università.) Tradotta dal Dott. Luigi Gaddi, con prefazione del Prof. Pietro Cogliolo. Milano, 1888.

We had occasion recently to refer to French and Spanish translations of Professor Lorimer's *Institutes of the Law of Nations*. Another gratifying proof of the substantial and universal value of the scientific work of another distinguished representative of the Faculty of Law in the University of Edinburgh has just come to hand, in an Italian translation of Professor Muirhead's *Historical Introduction to the Private Law of Rome*. The Italian translator is Dr. Luigi Gaddi, who gives an excellent and faithful rendering of the original. Dr. Gaddi has added admirable notes, in which he has not only referred to the recent Italian literature on the subject, but has contributed independent critical views on some of the points discussed by Professor Muirhead. Among these notes we have been struck by those on the Etruscan influence upon the political and juridical institutions of ancient Rome, on the origin of the plebeians, on *confarreatio* and *coemptio*, on the *legis actiones*, the *lex de tigno iuncto*, *stipulatio*, and many others, which all show accurate knowledge of the latest investigations, and are worthy of careful study. The translation is introduced by a preface from the pen of professor Cogliolo, of Modena, a high authority on the history of the Roman law, with whose recommendation the work has been translated for the use of students in the Universities of Italy, although himself the editor of Padeletti's excellent History (*Storia del Diritto romano*, 1886), and author of other works on the subject. Professor Cogliolo closes his preface with the following estimate of Professor Muirhead's work: "I conclude by saying that when last year I read in English this work by Muirhead, the idea I formed of it was that the Roman law is here expounded as a veritable history; that the results of a sociological series are always used without dwelling upon them; that in the midst of many

things and many ideas capable of being criticised, the thread of the historical development is continuous, and the sketch of all the law from the kings of Rome to Justinian is complete; that very many of the conceptions of the author give occasion for thought and research; that without too great a weight of erudition, of which we are beginning to get wearied, the work is woven of a scientific texture which is very clear, and, so to speak, always prudent; and that by its study not a little is to be learned, nor will it be found at all tiresome."

To this high testimony to the scientific character and value of Professor Muirhead's work we need add nothing; but we are pleased to recognise and reproduce it. An honour of another and equally gratifying kind has just been conferred upon the learned Professor of Civil Law from another not less competent quarter, in his election as an honorary member of the Juridical Society of Berlin,—a high distinction, upon which we beg to offer him our hearty congratulations.

We have received the following pamphlets:—

Test of Domicil. By FRANCIS CUTHBERTSON, LL.D. London: Stevens & Sons.

Counsels' Retainers. By E. B. G. London: Clowes & Son.

A Defence of the Hire System, based on Legal and Commercial Considerations. By H. E. TUDOR, Solicitor. London: Office of the *Journal of Domestic Appliances and Sewing Machine Gazette*.

Some Considerations in reference to the Limited Owners (Scotland) Bill, 1888. By DAVID MURRAY, M.A., Solicitor. Glasgow: James Maclehose & Sons.

The Month.

WE have received a copy of a Bill to amend the law of legitim in Scotland. The Bill is in one clause, and proposes a very simple, though, as we think, an equitable, change in this branch of the law. As is explained in a note printed along with the Bill, the representation by children of their deceased parents, introduced by the Intestate Moveable Succession Act of 1855, does not extend to the case of legitim. By clause 9, "Moveable estate shall mean and include the whole free moveable estate on which the deceased, if not subject to incapacity, might have tested." This of course only covers the dead's part, and the result is that if A die intestate, survived by B and C and by children of D, a predeceasing child, the legitim is divided between B and C only, while the dead's part is divided *per stirpes* between B, C, and the children

of D. To remedy this anomaly, this Bill proposes to enact that, "after the passing of this Act, grandchildren shall succeed to the shares of legitim in the moveable means and effects of their grandfather and grandmother, to which their predeceasing parent would have been entitled if he or she had survived his or her father or mother, as the case may be, but subject always to the exclusion, discharge, or satisfaction thereof, according to the existing law and practice of Scotland." There seems to be no justification for the present anomalous state of the law, and the remedy is so simple that there should be no difficulty in having it adopted. Of course one could understand the objection that the general question of succession should be dealt with as a whole, but as there is no immediate prospect of this being done, we fail to see why such amendments in the law as this Bill proposes should not be carried through now.

* * *

The Fusion of the Professions.—The opinion of an American lawyer—a prominent member of the Chicago bar—on the fusion of the two branches of the legal profession, is worthy of careful consideration. He says: "In the matter of the proposal to abrogate the distinction between barrister and attorney, some inquiry has been made by me to obtain any discussions of the subject which have come up in this country. Our own rule of no distinction has been so much taken for granted that we have really had little occasion for discussion. In the towns and smaller cities a practitioner does everything, but in the larger cities a division of labour very soon begins, a man doing most what he is best fitted for; and, I am bound to say, that this process of very natural selection works well. Association in firms is quite general, one partner doing all the work in the Courts. The really very best trial lawyers are regularly retained by other lawyers as associate counsel, and are accustomed to meet clients before and during a trial quite as much as though they were their own clients. In very important causes it is less and less the custom for any lawyer to try them alone. He may prepare them for trial, but gets assistance for the trial itself. Some members of our Chicago bar do little else all the year except try cases for or with other lawyers. Ability to cross-examine, or eloquence before juries, speedily gains a man employment by other lawyers. One advantage to be noticed is that, before actual practice, few men can tell whether they are fitted for Court or for office life. Special qualifications are often a surprise to the owner. Our bar, as you know, like our system very much. Under it, by the law of demand and supply, for great causes we are creating a small body who do advocates' work only, selected by the profession, without title or tenure, and securing employment so long as they are pre-eminently fitted."—*Pump Court.*

"I CANNOT tell a lie" (Washington).—The editor of that excellent periodical, the *Albany Law Journal*, thus soliloquizes: "We seldom read our journal—after reading the proofs. But, casually taking up the last number and glancing over its contents, it struck us as a remarkably interesting number—no vanity, now, for it is not our fault—but it seemed to us to chronicle and comment on an unusually large number of novel and striking cases, to say nothing of the current topics, for which we are too modest to take any credit." We are glad we came across this precedent. A similar thought struck us as we casually glanced at the last number of our journal. But for the simple candid boldness of our contemporary, our view of ourselves would have perished with us.—*Canada Law Journal*.

[This is a very common state of mind in Editors: we are a humble race.—ED. *J. of J.*]

* * *

WE have received a report by Committee appointed at a special general meeting of the Society of Solicitors and Procurators of Stirling, held at Stirling on 12th April 1886, in virtue of the following resolutions adopted at the said meeting, viz.—“(1) That holders of Government legal appointments, where the salary is an adequate one, should be confined to their official duties;” and “(2) That a Committee of the Faculty be appointed to inquire as to how far the principle embodied in the foregoing resolution is acted upon in the county of Stirling and throughout Scotland.” It may be sufficient to state that the Committee report against Procurators-Fiscal being allowed to carry on private practice, and state that, in their opinion, the official salaries paid to the Procurators-Fiscal and Sheriff-Clerk of the county of Stirling are of sufficient amount to justify their being confined to their official duties alone. This contention is supported by a list of the emoluments which the gentlemen in question enjoy. The matter is hardly one on which we can enter at present, but it is deserving of attention, and the general question is one to which we may recur at a future time.

* * *

Some of the Beauties of Trial by Jury.—The following able and unique charge to a jury was made by Hon. R. E. Rombauer, sitting as presiding judge in the trial of the celebrated case of *Deane v. Flood*, by the Grand High Court of the Legion of Honour, held in February last in St. Louis. The trial was for a breach of promise of marriage. It was attended by an immense audience, in which, of course, the fair sex predominated. The charge is of special interest, from the fact that the learned judge who delivered it occupies the position of presiding judge of the St. Louis Court of Appeals, and from the further fact that he has

served a term of four years as judge at *nisi prius*. Beneath its apparent levity there is an unvarnished picture of the value of the system of jury trial, drawn by the pen of one who is thoroughly competent to express an opinion on that question :—

“GENTLEMEN OF THE JURY,—Let me first thank you for having kept awake during the entire time of this protracted trial, and thus again refuted the slanderous charge of the maligners of our jury system, who maintain that during every important trial one-half of the jury fall asleep.

“We have been requested, both by the plaintiff’s and by the defendant’s counsel, to give you a large number of instructions touching the law of this case, as prepared by them. We have given all the instructions thus asked, but will not trouble you with reading them, nor with taking them to the jury-room, where they might be lost or destroyed. We have ordered the clerk to file them away safely, so that in case of an appeal by either party, they may be utilized in completing the record. This, as you are aware, is the only legitimate province and practical use of instructions.

“The case before you, Gentlemen, is one touching a very important subject, marriage. The two most essential elements in civilisation requisite to the existence and continuity of the modern state, are marriage and taxes; and as marriage is admitted to be quite a tax in itself, we may consider it as the most essential.

“Now the action for breach of promise of marriage is mainly distinguishable from other actions in this, that it will not lie if the adverse parties belong to the same sex. No well authenticated precedent can be found tending to show that this action has ever been brought by one man against another. Nor has any case been called to my attention where this action was brought by one woman against another. Still, I do not wish to be understood as asserting that this last contingency never occurred, since it is impossible to say what a woman may or may not do, when her blood is up.

“Fortunately, Gentlemen, we are not harassed with resolving that doubt in the present instance, since it is conceded by the evidence that the plaintiff is a woman and the defendant is a man; in fact, no one who saw and heard the plaintiff testify could for a moment entertain any doubt as to her sex. Thus we may assume at the threshold of our inquiry that there is no defect of parties in this case.

“Another fact equally important the testimony likewise concedes, namely, that the defendant is either innocent or else guilty of the breach of promise with which he stands charged. The importance of this fact cannot be overestimated, because if he could not possibly be guilty under the evidence, or could not possibly be

innocent, that is, if the testimony were all one way, this would greatly curtail, if not entirely abrogate, your prerogative as jurors to find a verdict in accord with your sympathies, or other motives of equal weight and consideration.

"These two main points in the case thus being settled, it only remains to charge you briefly on the points of law and your duties in the premises.

"VERY COMMON LAW.

"On all subjects not covered by statutes we are supposed to be governed by the common law of England. Breach of promise of marriage is one of those subjects. Our legislators, who could not conceive the possibility of any man refusing to marry a woman, particularly if she was young and pretty and willing to marry him, have not provided by statute for such a case. This action, therefore, must be governed by the rules of the common law. But what common law? Now, Gentlemen, it is generally supposed that there is only one common law, but we who have been charged with the trial of causes for many years know better. Common law is nothing but immemorial usage or custom, and there are two kinds of it, the common law of England and the common law of juries. This duality in the common law has led to this absurd result, that while judges charged juries according to the common law of England, juries returned verdicts according to a common law of their own. I shall not fall into the same error with my predecessors, and thereby aid in perpetuating this irreconcilable conflict, but will at once proceed to charge you according to what I understand to be the common law of juries, as that is, after all, the only one of any practical importance in this class of cases.

"One of the principal features of this law is that the character of the parties litigant is a very important, if not a controlling feature, in determining the verdict. Thus, if the defendant is a railroad company or an insurance company, all admissible presumptions must be drawn in favour of the plaintiff, and he is generally entitled to a verdict, regardless of the mere secondary matter of evidence. This is the immemorial custom of juries, and therefore their common law.

"So, it is a similar immemorial usage that, if the plaintiff is a woman and the defendant is a man, to find for the plaintiff. No departure from this rule is on record in any case where the plaintiff, as in the present instance, was young, pretty, witty, and vivacious. Some say that the foundation of this custom of juries is the gallantry of the sex. This proposition, however, I must deny. The true foundation, Gentlemen, is the regard which men have for their mothers.

"One of the great charter rights which your ancestors, Gentlemen, wrung from a reluctant tyrant at Runnymede, at the point

of the battle-axe, is the right to have a mother. This right is, so to speak, one of the palladia of our liberties, and is indirectly recognised in the Declaration of Independence in this wise : If we had no mother we could have no existence, and if we had no existence we could not be engaged in the pursuit of happiness ; yet to be thus engaged is, as every schoolboy knows, one of our inalienable rights, even though, unfortunately for us, this pursuit, like the pursuit of a train robber, rarely results in a capture.

"What I have stated above may in itself be sufficient to guide you to the true verdict ; still, if you also desire to pay some attention to the secondary matter of testimony, you should be guided by the following rules : If you believe the plaintiff and her witnesses are entitled to no credit you will disbelieve them, unless you further believe that the plaintive should have a verdict anyhow. If you find that the defendant's witnesses have departed from the truth, you will reject their testimony, unless your sympathies are with the defendant.

"Far be it from me to comment on the evidence. That matter is exclusively for you, Gentlemen. Still I cannot forego making a passing remark or two on that subject. I think the promise, with all appurtenances, sufficiently proven. The testimony of the fair plaintiff has unquestionably strongly impressed you with the probability of its truth. The lifelike picture of the situation could not be mistaken ; you all know that situation, because, to use an expressive phrase, you have unquestionably all been there at some time or another.

"The promise being thus established, the question is, Was there any cause given justifying its breach ? The main if not only cause we are told is flirtation with another man. But is this a cause ? Is not the right to flirt one of the inalienable rights of woman ? Is it not the pursuit of her happiness ? Was the Declaration of Independence written for man alone ? I need say no more.

"I think these few suggestions are sufficient to determine your verdict as to which party should prevail ; if not, you will have to determine it upon deliberation. I am sorry to say that, as to the method of deliberation, the authorities treating on the custom of juries are not quite agreed. Drawing straws, chuck a farthing, and toss a penny have all their supporters ; but I am of opinion that the best three out of five in the national game of euchre, between the leaders of the opposing factions in the jury-room, is more in harmony with the genius of our institutions, and a proceeding equally well supported by reason and authority.

"Having first settled the right or wrong of the case, and in one of the manners suggested determined to find either for plaintiff or for defendant, the further inquiry as to the damages remains, in case you find for plaintiff. The question of damages is one of the very gravest importance. It is the only one in which the

plaintiff and her lawyers are equally and evenly interested, and therefore must be handled by you with a great deal of care.

“MEASURE OF DAMAGES.

“If the plaintiff has a verdict, she is entitled by way of damages to all she has lost, and to all she has found, by the defendant's unwarranted conduct in breaking off the match. Now, what has she lost? She has lost the comfort of the defendant's society; she has lost the comfort of turning up her nose at some other woman who has missed getting a husband. She has probably also lost the comfort of a sealskin sack, and many other comforts too numerous to mention. And what has she found? She has found wounded affections; she has found that her best friend, who envied her with all her heart, now secretly rejoices at her discomfiture; she has found mental anguish, lacerated feelings, and a whole lot of other disagreeable things. For all these things, Gentlemen, she is entitled to full compensation. But here is the rub. How is this compensation to be measured? Most of these things have no market value, except, perhaps, the sealskin sack. Who ever heard Famous or Crawford advertising wounded affections and lacerated feelings, prime quality, at so much a yard? Neither are these articles sold upon our exchange either for cash or for future delivery. Not the most venturesome of our speculators ever got up a corner on mental anguish, although mental anguish has been the result of many a corner.

“Here again, Gentlemen, the great superiority of the common law of juries over the common law of England for all practical purposes is manifest. The simplest and most approved method to reach a result is this: After you have agreed that the plaintiff is to have a verdict, each of you takes the wounded affections, comforts of society, sealskin sack, and all other comforts and discomfords lost and found by the plaintiff, and above enumerated, and each of you makes a lumping estimate, so much for the lot, and, having thus made the estimate, writes it down on a piece of paper. After every one of you has done this, the estimates are footed up and their aggregate divided by the number of jurors.

“Thus, I am proud to say, has the practical mind of the American juror found a ready solution, even in the most complicated cases, of the admeasurement of damages.”—*American Law Review*.

* * *

The Employers' Liability Bill.—No fewer than three Employers' Liability Bills are before Parliament. But of course only Mr. Matthews' Bill has any prospect of passing. The other two measures have, no doubt, been introduced with some hope of affecting the final shape of the Government Bill. But they cannot and ought not to pass. There is no good reason, however, why

Mr. Matthews' Bill should not become law ; some of its very defects smooth its way and are in favour of its adoption. It has long become manifest that the existing measure could not be continued without general changes. Before it was many years old it proved to be neither what its friends nor its enemies expected. The masters found that they had much over-estimated its effects. Careful employers had little cause for alarm. Companies were willing to indemnify them for small premiums, and the majority of workmen to whom the offer of equivalent advantages was made were glad to contract themselves out of the Act. Those who were lured on by an inferior class of solicitors to bring ill-considered claims, found to their cost their mistake. Even when the Act comprehended their complaints, technical defences—for example, want of timely notice—barred the way ; and the doctrine of common employment was found to have survived to an extent which their advisers had not foreseen. Few Acts have been more heard of in Courts, and have produced less effect out of them. Were a statement showing the sums actually obtained by workmen through the agency of the Act, and those wasted in prosecuting unsuccessful claims or retained as costs, prepared, it is uncertain on which side would lie the balance. The Government measure is not framed upon any clear or boldly drawn lines. Like the present Act, it is avowedly a compromise ; and probably, in the present state of opinion as to the duties of employers, only a compromise is practicable. But this involves certain disadvantages—lack of clearness, subtlety, and uncertainty ; and we anticipate that under the new law, as was the case under the old, there will be a good deal of litigation before employers and workmen know exactly where they stand.

The Bill is in the main the outcome of the report of Lord Brassey's Committee, which reported in 1886 in favour of several changes in the law. One of them goes to the root of the matter. It was early discovered that workmen were ready to exchange the dubious benefits of the Act offered for the substantial advantages of an accident or a pension fund. In many trades contracts excluding its operation become the rule. Indeed, we are inclined to think that the clearest gain traceable to the change in the law was the stimulus which it gave to the establishment of provident funds. For reasons which are open to question, the Committee thought that entire freedom of contract should not be permitted, and their recommendation to that effect appears in the Bill. A workman will not lose the benefits of the measure though he has promised to give them up, and has been employed on that footing, unless the employer undertakes, so long as the former remains in his employment, to make "an adequate contribution towards such insurance, as hereinafter mentioned, of the workman or his representatives against every accident occurring in the course of his employment, and to make good to the workman, or, in the case of

death, his representatives, any sum which becomes payable in respect of the insurance, but which is not so paid." We are not told exactly what "adequate contribution" is. But there is a marvellous proviso, sure to be the subject of a thousand glosses. "The insurance shall be to such amount and on such conditions as will, having regard to the whole scope of the indemnity thereby given, and having regard to the proportion borne by the number of accidents in case of which the employer is liable to pay compensation under this Act to the number of accidents which are the subject of insurance, insure the workman, or in case of death his representatives, a benefit equivalent to the compensation recoverable under this Act." It is a wonderful jumble of phrases; an excellent instance of the fact that ability to write clear English is supposed to have nothing to do with drafting Acts of Parliament. If not downright polysyllabic nonsense, this jargon comes very near being such; and it will give pickings to a multitude of lawyers. Matters are made a little worse by enacting that, if there is any question as to the sufficiency of the employer's undertaking, it may be shown that other persons in similar employments have accepted it. The framers of the Act are aware that they have set a problem which no two persons will solve the same way, and they try to solve it in an original and unique way. An employer or workman may apply to the Home Office or the Board of Trade, and either of these departments may give a certificate as to the adequacy of the consideration, and "not only that contract, but contracts in similar terms with other workmen engaged under the same employer or his successor in business, and in a similar employment under similar circumstances, shall without further proof be deemed to have been made on such consideration as in this section mentioned." In other words, a clerk, it may be, in the Home Office or Board of Trade, with any or no real information before him, making any or no proper investigation, may decide not only as to the rights of A, who applies to the department, but of B, C, D, etc., who have perhaps had no opportunity of being heard. The object in view is admirable; there is to be a short and summary mode. But it may strike some minds that a still shorter and not more unjust mode would be to determine the point by lot. Never was there a more striking example of the straits in which legislators find themselves when they seek to look after grown-up persons and to protect them from themselves.

To all who accept the principle of the new legislation many of the proposed changes must seem improvements. There is no reason in the world why a conductor of an omnibus or tramcar should fare differently in case of an accident from a bricklayer. Some of the decisions as to who are workmen within the meaning of the Act are probably altogether at variance with the expectations and wishes of its framers. By an artificial process of reasoning, seamen have been excluded from the benefit of the Act.

This is often defended as only fair; and, considering that they are generally far removed from the control and eye of their employer, something may be said for the distinction. But no great harm will be done by applying to them the Act, subject to a few restrictions. According to the Government Bill—which here, too, substantially follows the advice of Lord Brassey's Committee—the employer will not be liable for injuries sustained elsewhere than in a port of the United Kingdom, unless, speaking generally, the injury resulted from a defect in the vessel when it quitted this country. For well-known legal reasons, an employer is not in general answerable for the acts of an independent sub-contractor; a workman under the existing statute must look to his immediate contractor. This sometimes produces curious and harsh results: of two men injured in almost identical circumstances one may recover and the other fail. This is altered by the Bill. If a person for whom work is done supplies machinery, plant, etc., and a workman of the sub-contractor is injured by reason of defects in them, it will generally be of no avail to say to the injured person, "Look to your real employer, I owe no duty to you."

The measure deals somewhat inadequately with one question much of late before the Courts. Obviously it is not right that a man should voluntarily with his eyes open undertake certain risks, and when he suffers by reason of them claim to be treated exactly in the same manner as one who never so consented. But by what degree of acquiescence he loses his right is uncertain. The matter seemed to have been set at rest by a decision of a Court of Appeal, which laid it down, that where dangers were visible and appreciable, a man who voluntarily encountered them could not recover under the Act. Since that decision, now about a year old, the Courts have shown the greatest ingenuity in finding exceptions to this rule. Thus it is said that if a master fails to observe a statutory requirement for the benefit of his men—under the Coal Mines Regulation Act or the Factory Acts, for example—it will not avail him to prove that his workmen accepted the risk. By a case decided shortly before last long vacation, fresh subtlety was introduced: "there must," it was said, "be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim, *Volenti non fit injuria*." A page of German metaphysics as to the "philosophy of the unconscious" is the nearest modern equivalent to the explanation of the tests to be applied when the question is whether a carter whose legs have been broken shall get damages. Unfortunately, the new Bill does not greatly help us. It says that mere knowledge is not enough; it does not clearly say what more is needed; and we foresee many other chapters in legal metaphysics. These are by no means the only provisions of importance in the Bill. It materially alters and, on the whole, improves the procedure. And it widens the category of persons

for whom the employer is answerable. Mr. Burt's Bill is much more drastic, for it proposes to make the employer answerable for the negligence of "any person," no matter apparently what his station or authority, "in the service of the employer," and the law would apply to "all servants, whether employed on land or at sea." This measure, however, need not be treated seriously by employers. What is in store for them is the substance of the recommendations of Lord Brassey's Committee, and their experience of the effects of the present law is such as to make them little anxious as to the result of the new proposals.—*Times*.

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Agents' or Servants' Frauds.—Some obscure doctrines have long prevailed as to the liability of principals for the fraud of agents, and of masters for the fraud of servants. A recent case, in which the Court of Appeal reversed the judgment of a Divisional Court, sufficiently shows that the doctrine has not yet become familiar to Courts, and hence it is important to recognise the position now laid down on that subject. Cases are constantly arising between masters and servants as well as between principals and agents on that point, or something very near it, and its commanding importance is self-evident.

Though innumerable cases have occurred between master and servant as to acts done by servants which have been alleged to be *ultra vires*, and so not binding on the master, these have usually turned on very special circumstances. It has long been familiar law, that a servant who does something entirely out of his province, or beyond the scope of his employment, does not involve his master in liability; but there is often much difficulty in settling what is the scope of a servant's authority and employment even in the most ordinary kind of business. Notwithstanding the constant litigation going on, there are cases which are more or less on the border line, where it is next to impossible to say whether the act complained of was without or within, or at least reasonably assumed to be within, the scope of the servant's or agent's authority. And where fraud is committed in the course of the servant's or agent's business, the difficulty is increased, because the contentions on both sides are more serious, and the question usually arises among the higher class of agents. But servants form only a sub-division of agents, and the rules are usually identical.

It was not more than twenty years ago that the question was prominently brought out before the Courts, whether a principal was responsible for a fraud committed by the agent in the course of his business. This was the case of *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259. The plaintiff had for some time, on the faith of a guarantee of the defendant, supplied Davis, a customer of the bank, with oats on credit, but he refused to continue to do so unless a better guarantee were given. The bank manager

thereupon wrote to the plaintiff that Davis's cheques to the plaintiff should be paid in priority to any other payment except to the bank. At that date the manager knew that Davis was indebted to the bank in £12,000, but did not inform the plaintiff, who was ignorant of it. The plaintiff thereupon supplied oats of the value of £1227 to Davis, who soon after gave a cheque for that amount to the plaintiff; but though Davis had previously paid £2676 into the bank, the bank kept the whole of that sum for their own debt, and dishonoured the cheque given to the plaintiff. The plaintiff sued the bank for the false representation made by their manager to the plaintiff, in giving a worthless guarantee, and the question raised was, Whether the bank were liable for the fraud of their manager? The authorities were elaborately reviewed by Willes, J., who delivered the judgment of the Exchequer Chamber. The Court said that the general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle was acted upon every day in running down cases. It had also been applied to direct trespass to goods, as in the case of holding the owners of ships liable for the acts of masters abroad improperly selling the cargo. It had been held applicable to actions for false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws. It had been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry or such like wrong. In all these cases it might be said that the master had not authorized the act. It was true he had not authorized the particular act, but he had put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent had conducted himself in doing the business which it was the act of his master to place him in.

The last case was, and has since continued, a leading case on the point as to the liability for frauds of agents and servants. Some other nice and difficult variations in the facts have since occurred, and it is only necessary to refer to one or two of these. In *Swift v. Winterbotham*, L. R. 8 Q. B. 244, the plaintiff, a customer of one bank, got his manager to write to the defendant, the manager of another bank, inquiring into the credit of one Russell, and its sufficiency to meet an amount of £50,000. The defendant's manager made a report which was false to his knowledge, and on the faith of it Russell was supplied with goods which were never paid for, owing to Russell's insolvency. The defendants, when sued, contended that they were not liable for their manager's fraud; but the Court, as before, held that they

were liable. There were several points raised, but the one which was material at present was thus disposed of:—"It was objected on the part of the bank that they, as principals, were not liable for the fraud of their agent, the manager, unless they authorized the commission of the fraud or ratified it. But we think the case of *Barwick v. English Joint-Stock Bank* is conclusive to show that the banking company is liable for the fraudulent representation of its manager, made in the course of conducting the business of the company."

To the same effect was the case of *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 Pr. C. 394, where again the manager of a bank, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of his principals, made a representation which misled a customer, and induced him to accept a bill in which the bank was interested. It was held, after referring to the previous cases, that the principals were liable, as the representation had been made within the scope of the manager's authority.

In the case of *Houldsworth v. City of Glasgow Bank*, 5 App. C. 317, the rule of law deducible from the last-mentioned cases was again discussed and their authority recognised, though the main point was, What was the peculiar remedy or remedies open to the person who had been deceived by the agent of the defendants?

The recent case of *British Mutual Banking Company v. Charnwood Forest Railway Company*, 18 Q. B. D. 714, is of great interest, as it brings out the importance of a qualification of the liability of principals for the agent's fraud, which consists in this, that the principal had profited by the agent's fraud. In that case the action was brought to recover damages for fraudulent misrepresentations alleged to be made by the secretary of the defendant's company. It appeared that certain customers of the plaintiff's bank had applied to them for advances on the security of certain transfers of debenture stock of the defendant's company. The bank manager called upon Tremayne, the secretary of the railway company, to inquire as to the position of these transfers,—whether they were valid, and whether the stock which they purported to transfer existed. The railway secretary satisfied the bank manager that the transfers were valid. It afterwards was discovered that Tremayne, in conjunction with one Maddison, had fraudulently issued certificates for debenture stock in excess of the amount which the railway company were authorized to issue. and the transfers in question were part of this over-issue. The security turned out worthless, and the bank lost the money advanced. It was also the fact that the railway company did not benefit in any way by the false statements of Tremayne, their secretary, which were made entirely in the interest of himself and

Maddison. It also appeared that it was within the scope of Tremayne's duties to make answer to such inquiries as the plaintiffs had made. At the trial a verdict was taken for damages, and leave was given to either of the parties to move for judgment. Afterwards the Divisional Court, consisting of Manisty, J., and Matthew, J., directed judgment to be entered for the plaintiffs. The railway company thereupon appealed.

It was contended by the defendants that as they had in no way profited by the false representations of their secretary, they were not liable. Here the act had been done by the secretary for his own and his friend's interest, and it could not be just that the principals should be deemed to have authorized such misrepresentation. On the other hand, it was contended that it was enough that the secretary was the servant of the railway company, and that it was within the scope of his business to make such representations as this on behalf of his company. What the secretary did was therefore binding, and the Court could not go behind the fact and inquire what amount of benefit may have accrued to the principal.

The Court of Appeal reversed the judgment of the Court below, but threw out the hint that the point raised in the Court below was somewhat different. The Court below held that the railway company were liable though they were a corporation. The Court of Appeal, however, thought there was another reason which showed that the railway company were not liable. If the company had directed their secretary what answers the secretary was to give to the plaintiff, then they would be liable. But here the secretary had no express directions of that kind, and made the statements exclusively in his own interest. He was not, therefore, acting for the defendants. If he had had the principal's authority to do the act, it would not matter whether the principal was benefited or not. But where there was no express authority, it made all the difference whether the principal profited or not. And it was observed that no case could be produced where the principal was held liable when the servant made the statements only in his own interest.

Some discussion occurred as to whether the servant in this case could be said to be acting within the scope of his authority, in other words, whether he was authorized to do acts "of that class." Bowen, L.J., answered that argument by putting it in the form of a dilemma. He said: "The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not be within it, for the company had no power to bind themselves to the consequences of any such answer. If it is not within it, on what ground can the railway company be made responsible for an agent's act beyond the scope of his employment, and from which they derived no benefit?" The same judge observed that he gave no opinion as to how far a statutory corporate body could

in any case be made liable in an action for deceit beyond the extent of the benefits they have reaped by the fraud.

Though these decisions have occurred as to the higher order of servants, yet the same principle will equally govern the acts done by servants of every degree in the ordinary course of service. The difficulty will chiefly be to trace out the quantum of benefit which may have accrued to the master, for the test will be in most of the cases where no express authority has been given, whether the master's business has materially benefited by the servant's fraud.
—*Justice of the Peace.*

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF FALKIRK.

Sheriff SCOTT-MONCRIEFF.

WEBSTER v. CALLENDAR COLLIERY FRIENDLY SOCIETY.

Sick Member — Aliment — Violation of Rules.—Circumstances under which the member of a friendly society was held not to have forfeited his right to aliment by a violation of a rule against the transaction of business during the period of sickness.

The facts of this case are stated in the judgment pronounced in the Small Debt Court held at Falkirk on 23rd May 1888:—

"This is an action at the instance of Archibald Webster against certain parties who represent as office-bearers the Callendar Colliery Workmen's Yearly Friendly Society. The pursuer seeks to recover the sum of £1, 17s. alleged to be aliment due to him as a sick member of this society during a period extending from 8th February to 11th April of this year. The society is not, I understand, registered under the Act, and a technical objection might have been taken accordingly to the mode of citation; but very properly the defenders have waived that objection. The defence is that the pursuer is not entitled to aliment in respect that he has violated article 8 of the society. That article provides that 'no member when off work and receiving aliment shall be permitted to do any manner of work' or 'transact any business of any kind.' The penalty for the violation of this rule is forfeiture of his aliment during that illness. Now it is averred that the pursuer, while in receipt of aliment last spring, paid a visit to a lawyer in answer to a letter received from him, and it is contended that this act amounts to such a contravention of the rule as to justify the society in stopping further aliment. I quite sympathize in the endeavours which such societies as the present make to ensure that their sick funds, to which all the members contribute, shall not be wasted upon undeserving cases, and that no one shall have any inducement to sham sickness, or, when really ill, be entitled to indulge in such acts as may retard his

recovery, and then render him a burden upon others for a longer period than his sickness would naturally have lasted. Rules such as those now before me are not only right or necessary, but are to be construed strictly. At the same time the construction must always be a reasonable one; and I am of opinion that, looking to the whole circumstances of this case, the application of this rule to the pursuer would not be reasonable. Carry the prohibition against transaction of business to its extremity, and you land in absurdities. Take the case of a sick member off work but not unable to move about. He may live alone and unfriended. Is he to be prohibited from visiting the butcher, or baker, or grocer for his daily provisions? Or if a lawyer writes to him demanding, it may be, payment of a debt or threatening a poinding, is he to be prohibited from answering the letter on pain of forfeiting his right to aliment? Clearly these acts which I have suggested are acts of business. If you buy, you transact business. If you even write to the lawyer to tell him that you cannot attend to business, the very act of writing the letter might be held to come under the prohibition. To make your will (and that is a matter to which a sick member may not unreasonably direct his thoughts) is clearly doing business. In the present case the act complained of may not have been a wise or prudent one on the part of the pursuer, because his visit to his lawyer involved a long walk. But no precise limit is put to the walking powers of sick members by these rules, and it is not really the walk that is complained of, but the conversation which took place between the pursuer and a well-known 'man of business,' in the office of the latter. Now it is proved that this solitary act—for it was a solitary act—originated in no impulse of the pursuer, but was due to a letter which the lawyer wrote, and which it might, for all I know, have been rather awkward for the pursuer to leave unanswered. I do not think, therefore, that it can be reasonably said that the pursuer has violated this rule of his society. He was, and still is, plainly unfit to work as a miner, and I am prepared to award him the sum sued for."

Act. Wilson—Alt. Allan.

Notes of English, American, and Colonial Cases.

PATENT.—*Amendment of specification—Proceedings for revocation—Costs—Patents, etc., Act, 1883 (46 and 47 Vict. c. 57), s. 19.*—A petition for revocation of a patent, which was presented in December 1886, was set down for hearing as an action with witnesses, and the hearing being imminent in November 1887, the patentees applied for liberty to apply to amend their specification and a postponement of the hearing. The application was granted, upon terms of the applicants prosecuting with diligence their proposed application for leave, and paying all costs of the petition up to and including the application itself.—*In re Gaulard & Gibb's Patent*, L. J. Rep. Ch. 209.

COPYRIGHT.—*Musical composition—Representation contrary to right of author—Consent in writing*—3 and 4 Will. IV. c. 15.—The plaintiff, a musical conductor in the defendant's employment at a weekly salary, who had on several occasions composed music for ballets performed at the defendant's music-hall, for which he was afterwards separately paid by the defendant, composed the music for a ballet to be performed during the Christmas holidays. After three performances had been given, the plaintiff gave a week's notice to determine his employment, but quitted his employment before the expiration of the week, taking with him the musical score. The defendant, having obtained the score from the plaintiff, represented the ballet and music on the remaining days of the week. The plaintiff having brought this action in respect of these latter representations for penalties, under 3 and 4 Will. IV. c. 15, s. 2, for representing the music contrary to the right of the author, the jury found that the music was an independent musical composition, and had not been sold by the plaintiff to the defendant:—*Held*, that the defendant, having represented the music without "the consent in writing of the author," as provided by the statute, was liable. *Eaton v. Lake* (App.), 47 L. J. Rep. Q. B. D. 227.

Shepherd v. Conquest (17 Com. B. Rep. 427; 25 L. J. Rep. C. P. 127) followed.—*Ibid*.

Halton v. Kean (7 Com. B. Rep. N. S. 268; 29 L. J. Rep. C. P. 20) distinguished.—*Ibid*.

REVENUE.—*Income tax—Sea-wall or embankment—Lands reclaimed from tidal river—Deduction*—5 and 6 Vict. c. 35, s. 60, *Schedule A, No. V.*: 16 and 17 Vict. c. 34, s. 37.—Land was reclaimed in the estuary of a tidal river between 1853 and 1858. Shortly after the last date it became a salt marsh, and, although liable to be flooded at every tide, worth as pasturage from 5s. to 10s. an acre per annum, and was assessed to the poor rate and income tax at from £300 to £350 per annum. In 1880 the owner constructed an embankment at an expenditure of £16,541, 4s. 1d., which excluded the tidal water, and thus raised the value of the land to from £3 to £3, 10s. an acre per annum. In 1885–86 the owner claimed, under the 37th section of 16 and 17 Vict. c. 34, a deduction of one twenty-first part of this expenditure from the total assessment of the land to the income tax, on the ground that the embankment was made for the protection of the land against the encroachment or overflowing of the tidal river:—*Held* that, as the embankment of 1880 was not made or required to protect or preserve the land in its then condition, but to render a new and more valuable property land which had already been assessed to the income tax as worth something, the owner was not, under the terms of the 37th section, entitled to a deduction. *Hesketh v. Bray* (*Surveyor of Taxes*), 47 L. J. Rep. Q. B. D. 184.

PATENT.—*Threats of legal proceedings—Injunction—Contingent threats—Patents Act, 1883* (46 and 47 Vict. c. 57), s. 32—*Negotiations "without prejudice."*—The threats of legal proceedings referred to in section 32 of the Patents Act, 1883, need not relate only to acts already committed, but may also be contingent warnings directed to future acts. *Kurtz & Co. v. Spence & Soms*, 57 L. J. Rep. Ch. 238.

THE JOURNAL OF JURISPRUDENCE.

THE VALUATION ACTS.

I.

Of all modern statutes, perhaps none has required less amendment in course of time than the Lands Valuation Act of 1854. Although it introduced a great change in the practice of this branch of the subject of Local Taxation, it practically only reaffirmed the principle upon which that taxation had always been based, viz. upon the actual value or real rent of the assessable subject; while by providing for periodical revision of the valuation, it prevented the recurrence of the anomalies and abuses resulting from the adoption of a value fixed centuries before. The equality of incidence which characterized the rates in Scotland, made it possible to separate the operation of valuing the subject from that of assessing it, and to establish, as was done by that statute, a separate tribunal and certain officials for the former purpose without interfering with the right and duties of the various local authorities who perform the latter function. But the separation of valuation from assessment, which thus distinguishes the Scottish system, has its disadvantages as well as its advantages. It has tended to diminish the importance of questions of valuation pure and simple in the eyes of the ratepayers,—indeed, the framers of the Act did not appear to think these worthy of consideration by the law Courts, and no appeal from the decision of the local authorities in county and burgh, whose duty it was to superintend the valuation roll, was at first provided. This has now to a certain extent been remedied, but even now the Court of appeal in valuation cases merely gives an opinion, not a judgment proper, upon the questions submitted to it, and has no power to deal with the parties contending before it as ordinary litigants—to take evidence, award expenses, and the like. No doubt questions of valuation do occasionally arise in litigations before the ordinary

law Courts, and valuable decisions have thus incidentally been given. But the law of valuation in Scotland has so far been deprived of that development which it might have attained from judicial decision, and which it has attained in England, where mixed questions of rating and valuing have been amply elucidated by the judgments of the supreme Courts, and even of the House of Lords itself. The Valuation Appeal Court (so called) in Scotland is not, properly speaking, a Court of law at all. It consists of two judges of the Court of Session, but their duties are really not judicial. They need not sit in public, they need not hear counsel, and they can only give an opinion on the points at issue. These latter, though often of great public importance, are seldom, except in the case of large undertakings, of much intrinsic consequence to the individuals concerned; and when debates do take place before this ineffectual tribunal, they are too often of a purely academic character, and frequently only lead to a difference in opinion on the bench, which simply leaves the matter where it was before. It seems, therefore, difficult to avoid the suspicion that the freedom from amendment which the Act has hitherto enjoyed, while largely due no doubt to the simplicity and comprehensiveness of the statute itself, is also to be ascribed in no small degree to the abstract nature of the subject with which it deals, and the peculiar constitution of the tribunal in which its provisions are elucidated. The suspicion is confirmed when we find that of late years several Bills have been introduced in Parliament with the object of amending the Act in various particulars. They have met with the usual fate of measures having only an abstract and comparatively remote good in view, and their failure to become law has attracted little or no attention. Recently, however, the House of Commons appointed a Select Committee of their number to "consider the law relating to the rating and valuation of the various kinds of property subject to assessment in Scotland, and to report what amendments may be necessary thereon." That Committee has not yet issued its report, and it would be neither profitable nor becoming to speculate (even although the evidence taken before it, which has appeared in the public prints, might render it possible to do so) on what that report may be. Our object is rather to aid the intelligent appreciation of that report, when it shall appear, by a short explanation of the present system and the chief points in which it appears to have been found defective.

What Mr. Rankine (*Law of Land Ownership in Scotland*, 2nd edition, p. 194) aptly describes as "the inveterate tendency of public taxation to settle down on the land as the most obvious and constant factor of the national wealth," has led in modern times to the adoption of the ratepayer's interest in his heritable or real possessions as the measure of his ability to contribute to the revenue of the country. This may not be an ideally perfect measure,

but it appears to be the most practical and practicable standard in our present state of political advancement,—at all events, as regards taxation for local in contradistinction to imperial purposes. It has further the recommendation of history, for the “real rent” of to-day is the lineal successor, so to speak, of the “valued rent” and the “old extent” of former times. The framers of the Act of 1854 introduced no new standard, they simply remedied the defects of the old. Land rights and rights of a similar character still remained the standard of taxpaying ability. But the valued rent, a valuation made more than two centuries ago, became, in time, palpably inapplicable to modern requirements, and in that year a new mode of valuing them was instituted. Its object was twofold—to establish a general criterion of value, and to provide for the revision and correction of that value from year to year. The rigidity of the old system was its great defect. If it had provided for periodical corrections, we might, perhaps, have retained it still. But values changed. Those of Charles II. were not those of Victoria, and the rating authorities were not always able to adapt themselves to the change. Many of them had power to ascertain the real rent of the lands, and bravely endeavoured to do so. But the anomalies (now fortunately merely the curiosities) of rating thence arising became too numerous and glaring to face public criticism. A new system became absolutely necessary. The wonder only is that the old survived so long.

The criterion of value established by the Act of 1854 remains practically the same still—only in minor details has the Act been altered. It is, substantially and briefly, the rent which is or may be got for the subject assessed,—what, in the oft-quoted and expressive phrase of Adam Smith, the “higgling of the market” may produce to the owner,—or what the Act itself, in its sixth section, defines as “the rent at which one year with another the lands may in their actual state be reasonably expected to let from year to year.” On this standard all local rates are at present imposed. The rent which the owner receives, and that which the tenant is willing to pay, is taken to be the value of the subject, and the sum on which both pay the local rates according to their interests in it respectively. Of course the simplicity of this rule is no doubt open to the objection of vagueness; and owing to the causes already alluded to, its elucidation by judicial decision has been somewhat slow. But the series of opinions upon valuation questions which have at length been elicited renders it now comparatively easy of application in ordinary cases. There is, however, a numerous class of ratepayers, for the most part representatives of the larger public undertakings, who object to “rent” being held to be “value,” at least in their particular case, and who have at length succeeded in having the matter referred to the Committee referred to, before which those who desire amendment in some other parts of the system of valuation also take the opportunity of stating their views. The fore-

most objectors are those who say that rent in their particular instance is either not obtainable or not conceivable, and the chief among them are the officials of the water and gas supplying bodies. The readiest mode of applying the Act is to take the rent, if any, actually paid, and enter it in the roll as the annual value of the subject. In the majority of cases the rent in the lease represents the annual value of the subject let, and may be inserted in the valuation roll as such. But where it does not do so, as for example when the rent is reduced in consideration of a slump payment by the tenant, or of improvements executed by him, these circumstances are taken into consideration, the stipulated rent is disregarded, and the true annual value otherwise ascertained. Obviously, in such cases, the rent in the lease is merely the nominal not the real rent, which it is the purpose of the Act to ascertain; and neither owner nor occupier can complain of being assessed upon the real value of the property to each of them respectively, instead of merely the fictitious rent they have agreed upon. Again, every subject is lettable, or may be supposed to be capable of producing rent. Many, of course, are not let, and for some it would perhaps be impossible or extremely difficult to obtain a tenant. But where it is possible to imagine a tenant, it is always possible to arrive approximately at the rent which he would probably pay. And hence the rent criterion of value, though in some cases difficult, has always proved possible of application, and possesses the merit of universality in addition to that of simplicity. In dealing with a "hypothetical" tenant, however, various puzzling questions have arisen. The Act to a certain extent aids their solution by defining the rent as that which may be expected from the subject of valuation in its "actual state;" and accordingly the first principle of valuation recognises the necessity for its being so maintained. Till, therefore, due provision has been made for this purpose, no rent can be assumed. Again, no tenant ordinarily leases a subject without some inducement, and accordingly no rent can be assumed until the tenant's profits have been allowed for. It is therefore by a process of exclusion such as this that the annual value of large and complicated undertakings has been usually arrived at, where no aid in ascertaining the rent of them, either by comparison or by analogy, is available. In applying it, however, to statutory undertakings of a public character, much difficulty has arisen and conflicting opinions have been delivered. The puzzles have been chiefly created by the limitations imposed by their several private acts upon the majority of these corporations. Most of them are prohibited from raising greater revenue than may be strictly required for the purposes of their existence. Gas and water companies, for example, levy rates to meet the cost of supply only,—they are in general unable to make profit out of the commodity in which they deal. The tenant's inducement to lease them, therefore, falls away, and the "hypothetical tenant" becomes

not only a practical but a logical impossibility. But the Act still requires the rent to be ascertained which a "tenant might reasonably be expected to give;" and if the subjects are to be valued at all, that rent must be found somehow, even though it should be by an effort of the imagination at the expense of the reasoning powers. Nor have the administrators of the Act shrunk from the task. It was decided that the subjects must nevertheless enter the roll, in spite of the fact that they could not be let, and therefore no profit could be made out of them. Taxation, and consequently valuation, was held to be irrespective altogether of beneficial occupancy. And so the gross revenue of the undertaking was adopted as the basis of valuation. It was further decided, in the case of the Dundee Gas Works (12 June 1881, New Series, Case 1), that no deduction from this revenue should be allowed for tenant's profits when, as in that case, none could possibly be earned. In a later case, however, that of the Falkirk Gas Company (24 Feb. 1883, Case 23), an equally authoritative opinion was given in favour of allowing such profits. The nature of the subjects to be valued was the same in both cases, but in the latter the proprietors, being an ordinary joint-stock company, were under no inherent disability as to letting their works. That feature, however, presented itself much more sharply, and was pushed much further in argument, in a number of appeals presented in 1884 to the Lord Ordinary on the Bills (Lord Kinneir), against the valuation by the various assessors of some of the largest waterworks in the country. The circumstances of all the undertakings were similar, if not identical, and the case of the Glasgow Waterworks Commissioners was argued and considered as ruling the others. There the works were not only incapable of being let, so that no rent could actually be obtained from them, but the revenue of the undertaking was incapable of profitable increase, being leviable only for the purposes of maintenance and the payment of debt. The undertaking was carried on by means of rates payable by the water consumers, but the commissioners who levied these rates were bound by their statute to levy no more than their annual expenditure required. Any surplus of income over expenditure in one year they were bound to apply in reducing the rates of the next. Further, a large portion of these rates, the balance remaining after providing for the working and maintenance of the undertaking, was applied, first, in paying the price of older waterworks which had been taken over by the new concern, in the shape of perpetual annuities to the former owners, and, second, in accumulating a sinking fund for the purpose of ultimately extinguishing that debt. Against the valuation of the assessor, made up from the year's revenue of the undertaking, less the cost of working and maintaining the works, the Water Commissioners objected, in the first place, that the statutory conditions under which they held the property

rendered it of no value at all. They admitted that it must enter the Valuation Roll, but at *nil*, because no tenant could ever be reasonably expected to give rent for what he could make nothing out of: in other words, that the subject was one to which the criterion of value prescribed by the Valuation Act was entirely inapplicable. This somewhat startling proposition was supported, from an equitable point of view, by the ingenious suggestion that the value of the waterworks already appeared on the roll, and was subject to taxation, in the shape of the enhanced value of the heritages in the district by reason of the water supply. The answer, however, to this plea of exemption—for the nugatory valuation proposed really amounted to exemption—was found in the series of *rerum judicatarum*, the result of which was summed up by Lord Fraser in the Dalbeattie case, No. 20, decided 1st March 1882, as follows: "It is now settled law that property which is capable of yielding a nett annual value—that is to say, a rent beyond the necessary outlay for those repairs, insurance, or other expenses that must be made in order to command that rent—is property that must be valued. It is not necessary that the property should actually be beneficial to the administrators of it." And in the same case, Lord Lee, who agreed with his brother judge, remarked, "The sixth clause of the statute does not, in my opinion, require or imply that the proprietors of lands and heritages for the time being shall have power to let them, or shall be able to make a commercial profit of them. All that it does is to give a rule for estimating yearly value. Accordingly the practice has been, in regard to all subjects which are not in their nature *extra commercium*, and which are lands and heritages within the meaning of the statute, to enter them in the roll, and value them." The proposal to exempt the works of their undertakings from assessment, either directly, by not entering them on the roll, or indirectly, by putting a negative value upon them, has thus been consistently rejected; and the value put upon them has been based upon the amount yielded by the water rates. In the appeals referred to, the question of allowance for profits to be attributed to the hypothetical tenant was not apparently raised, or was not pressed. But the appellants claimed to deduct from the gross revenue not only the necessary expenditure for repairs and maintenance, but also that part of the revenue which was raised and applied by them in paying the annuities for which they were liable in respect of the old works purchased by them, as well in providing for the sinking fund. They argued that the old works had to a large extent become useless, and been in part abandoned or sold, although revenue still required to be raised for payment of the annuities. To value on the gross revenue, therefore, without deduction, would lead to an assessment on property which no longer existed. They further claimed to deduct from the assessor's valuation the amount of the revenue applicable to the

sinking fund, in respect that it could not be held to represent the annual value of lands and heritages within the meaning of the statute, but at the best went to the creation of a subject (*viz.* the sinking fund) not capable of valuation or assessment to local rates. And in support of their contention they pointed out that, assuming the correctness of the calculations upon which the sinking fund was based, and the success of its operation by the gradual diminution and ultimate extinction of the debt for the payment of which it was created, the annual assessment for it would steadily diminish, and finally cease to require to be levied. This, they held, showed that valuing such undertakings on the basis of their gross annual revenue for all purposes led to an absurd result, and ought to be corrected by a deduction in respect of debt. These deductions, however, were not allowed, the Lord Ordinary on the Bills, whose decision was final, holding it to be immaterial for what purpose the revenue was raised, or to whom it was paid,—the material question, in his opinion, being whether the money expended on the annuities and in the sinking fund was revenue arising from the ownership of the works to be valued. He further considered any distinction between landlord's and tenant's charges to be inapplicable to a case where, in consequence of statutory restrictions, there could be no division of revenue between landowner and tenant, and adopted the principle of valuation already sanctioned by the valuation judges, of nett revenue from water rates, under deduction of all necessary outlays. This judgment was modified in the following year by a succeeding Lord Ordinary on the Bills (Lord Trayner), who allowed deduction of the items of outlay in rates and taxes only so far as regards the proportion thereof payable by a tenant.

(*To be continued.*)

THE ROYAL COMMISSION ON LOSS OF LIFE AT SEA.

PART II.

THE new policy, which the Commissioners say that they regard as the only feasible one in the circumstances, is *to increase the direct civil responsibility of shipowners* for sending their vessels to sea in a seaworthy state, and keeping them in that condition. The reasonableness of such a policy is apparent on the surface. It is the duty of every shipowner, who is entrusted with the lives and property of his fellow-men, to take all possible precautions for ensuring their safety; and if he fails in the discharge of this duty, it is but right that he be compelled to make reparation to those whom he has wronged. Accidents will, of course, continue to happen to the end of time, and for these it would be monstrous to

hold the shipowner responsible. There is, however, a wide difference between accidents of this kind and casualties which would or might have been avoided by the exercise of proper care and forethought, and of these the burden should certainly be laid upon his shoulders. But, as will be apparent later on, the proposals made by the Commissioners for carrying out this new policy amount to very much more than a mere increase of the shipowner's direct civil responsibility for sending out and maintaining his vessel in a seaworthy state. And just in so far as they exceed the principle they profess to embody, it will be seen that they must be condemned.

The Commissioners, after thus defining the new policy they are to recommend, proceed to consider the direct civil responsibility of shipowners in relation—(1) to underwriters who insure the vessels; (2) to charterers and others who are the owners of the cargoes which the vessels carry; and (3) to the officers and men employed on the vessels.

To take the last first. By the common law, it is pointed out, there is no implied contract between the shipowner and the seamen employed by him that the vessel is seaworthy. This was indeed altered by the Act of 1876, which made the shipowner responsible for the seaworthiness of the vessel, leaving him, however, still free from liability to his seamen for injuries occasioned by the negligence or fault of others in the same employment. And this still remains the law, as the Employers' Liability Act of 1880 does not apply to seamen. The term "workman" in that Act is defined as meaning "a railway servant and any person to whom the Employers and Workmen Act, 1875, applies." And in this latter Act it is expressly provided by the 13th section that it shall not apply to "seamen or to apprentices to the sea service." By the 11th section of the Merchant Seamen (payment of wages and rating) Act, 1880, this 13th section is repealed in so far as it operates to exclude seamen and apprentices to the sea service from the operation of that Act, which it is declared shall accordingly apply to them. But the section goes on to provide that this repeal shall not, in the absence of any enactment to the contrary, extend to or affect any provision contained in any other Act passed or to be passed, "whereby workman is defined by reference to the persons to whom the Employers and Workmen Act, 1875, applies." And accordingly "seamen and apprentices to the sea service" are still outside of the sweep of the Employers' Liability Act. There seems every reason for the Commissioners' recommendation that this should no longer be the case, and that the seaman, as much as any other labourer, should be placed in possession of the benefits of that Act. This is exactly the sort of recommendation they might have been expected to make. It fairly expresses the policy they have adopted, a policy which, as has been already said, is reasonable and right. It proposes to confer on the seaman no

right to which he is not fairly entitled. And by making it the interest, as it has always been the duty, of every shipowner to employ only capable and trustworthy officers, it should, indirectly, do a good deal to raise the standard of efficiency all round. But little hardship will be occasioned by such a change in the law to the great majority of respectable shipowners, while it should have considerable effect in restraining and checking the nefarious minority.

Coming next to the civil responsibility of shipowners to charterers and owners of cargoes, the Commissioners briefly indicate how the law at present stands. At common law the shipowner is responsible, in the absence of any contract to the contrary, for the seaworthiness of his ship and for the negligent acts of his captain. This liability, however, has been restricted by statute to a sum not exceeding £8 per ton on the registered tonnage, except where the loss has been caused by fire, when no liability at all attaches to the shipowner. By ingeniously framed bills of lading, shipowners have managed to still further diminish their liability to a very material extent, often causing it to disappear altogether. This was brought under the notice of the Royal Commission of 1874, who recommended that no provision in a bill of lading having for its object to avoid or limit the liability of a shipowner for goods shipped under it, should be valid, if the ship had been lost through having been sent to sea in an unseaworthy condition, unless he can prove that all reasonable means had been used by himself or his representatives to make and keep it seaworthy. No heed was paid to this recommendation at the time. But on the face of it it is sound and reasonable, and it is very properly adopted and emphasized by the present Commissioners. Like their proposal to bring seamen within the Employers' Liability Act of 1880, it has the advantages of going straight to the point without unsettling a whole branch of law by the way, and of not working injustice to any appreciable extent; and, like it, this recommendation may receive hearty and unqualified approval.

We come now to what the Commissioners apparently consider the keystone of their report—the responsibility of shipowners under the law of insurance. They go into this matter at great length, and the alterations in the law which they suggest are numerous and sweeping. A great deal may be said in favour of restricting marine insurance to a mere contract of indemnity, and of securing that no shipowner shall make a profit out of the loss of his ship. This, no doubt, was the original idea of insurance, and it was only the practical difficulty of ascertaining the true value of the vessel at the date of the loss that led to the introduction of valued policies, whereby the underwriter accepted an agreed on sum as the value for the purposes of the insurance—a practice which has of course put it into the power of a shipowner to over-insure, and so make a profit out of the loss of his vessel. To

prevent this, by limiting the insurance to an indemnity, may indeed be right and proper. There are, no doubt, practical difficulties in the way, but these do not appear to be insuperable. There is no reason, in the nature of things, why a shipowner in insuring should not value his vessel as he pleases, it being, however, part of the contract that it shall be open to the underwriter, if he can, to prove that the valuation was excessive, and to pay only the true value of the ship. No underwriter would dispute the valuation unless he had very good grounds for so doing. But the knowledge that the valuation might be disputed would operate powerfully to prevent shipowners from paying excessive premiums from which they might derive no advantage.

Of course such a system would not absolutely prevent all fraud, and an occasional shipowner here and there might still benefit by an occasional shipwreck. But, on the whole, it would probably work as well as the present system of fire insurance. And it is very questionable whether any system that can be devised would do any better.

But the Commissioners go much further than this. They are not content with preventing the shipowner from making a profit out of the loss of his ship; they think it necessary that he should be made to lose thereby. And accordingly what they propose is that he should be prevented from insuring up to even the fair and true value of his ship, and be compelled to retain some uninsured risk in his own hands. Their devices for ensuring this result are beyond question entitled to all the credit that ingenuity deserves. But they are open to many and grave objections, for which ingenuity is hardly an adequate set-off. It is difficult to see how compelling a shipowner to retain an uninsured risk is equivalent to increasing his direct civil responsibility either to his seamen, his charterers, or his underwriters. The connection may possibly exist somewhere in the minds of the Commissioners, but it has not been made apparent in the report. This proposal is not a development of the policy which the Commissioners at the outset declare to be the only possible one to adopt. It is a different policy altogether, and it is open to objections from which the other is entirely free. Its aim is very apparent, viz. to secure that disaster at sea, to whatever cause it may be due, shall prove also a disaster to the unfortunate shipowner. Whether he be in any way to blame is immaterial. Enough that a loss has occurred, he must be made to suffer *pour encourager les autres*. If it be granted that such drastic legislation is necessary, the ingenious devices of the Commissioners are certainly calculated to prove effective in securing that no ship shall ever be fully insured, though for various reasons it is more than doubtful whether they will result in any appreciable diminution in the loss of life at sea, which is the ultimate end the Commissioners in all their proposals have in view. But as such legislation would, in the opinion of those best

qualified to judge, prove most injurious to the shipping industry, it is probable that it will not be adopted without further consideration. Contemplation in detail of the Commissioners' misplaced ingenuity may thus be delayed until some future time, when the country has made up its mind to overturn the law of marine insurance, and impose irritating and injurious restrictions on the whole shipping industry on the chance of thereby striking at the few disreputable offenders, whose existence in greater numbers than in any other industry or calling is by no means clear.

At present it will be enough to make one general observation with regard to the proposals of the report as a whole.

The public opinion which is responsible for the existence of this and other Commissions, and for the legislation which has followed, and may hereafter follow on their inquiries, is not concerned in the slightest degree with the loss of ships, save in so far as that means also loss of life. Nobody believes for one moment that underwriters are incapable of taking care of their own interests, though many people do believe that seamen require some special protection at the hands of the State. It is really in the interest of the seamen alone that Commissions have been appointed and Acts of Parliament have been passed. If the underwriter makes a bad bargain, so much the worse for him; it will teach him to be more careful next time: there is no earthly reason why he alone of all business men should be placed beyond the chastening influences of experience. But people who reason thus also hold, and hold strongly, that a shipowner should not be allowed to send out unseaworthy ships and make a profit out of the death of his unfortunate seamen. The Commissioners have made it clear how difficult it is to secure what is wanted by criminal legislation. And they are right in assuming that the best way of putting a stop to such nefarious enterprises is to secure that they will be the reverse of profitable. By extending the Employers' Liability Act of 1880 to seamen, and limiting the competent exceptions in bills of lading, as is proposed in the report, it is highly probable that the desired result will be attained. And if something more were found on trial to be still necessary, there is no reason why attention should then not be turned to the law of insurance, and the contract limited, as has been suggested, to a mere contract of indemnity.

But in proposing, as they do, to revolutionize the whole law of marine insurance, and to deprive the shipowner of rights which he has hitherto enjoyed along with every other trader, the Commissioners have gone far beyond, not perhaps the letter of their instructions, but certainly the necessities of the case, and that public opinion to which their official existence is due. It may not be desirable—even were it possible—to extend now to the shipping industry that fostering care which it enjoyed for so long,

and with such beneficial results to the nation and to itself, but the Legislature certainly can and ought to abstain from unnecessary molestation. And even those excellent persons who believe most firmly in the need there is for protecting the seaman from rapacious and unprincipled employers, must admit that this protection should be afforded in the way that involves the least possible injury to the shipping industry as a whole. The proposals of the Commissioners have not been framed in any such spirit. Even if it be assumed that they are fitted to secure their end, still their disregard of consequences approaches the sublime. There are, it is known, various ways of roasting a pig. One is to set fire to the house,—very effective, but attended by disadvantages on which it is unnecessary to dwell in detail. Analogous disadvantages are attached, in our opinion, to the Commissioners' new policy of "thorough,"—not to the policy as defined in the early part of the report, but to the policy which is really put forward in some of the specific recommendations on which they lay the greatest stress. They are indeed quite entitled to recommend such a novel policy if they think it called for by the circumstances of the case; but they are not entitled to enunciate one policy at the beginning of their report, and recommend quite another at the end. And matters are not improved when the one policy is fair and reasonable, and the other is neither.

Viewed by itself the report is an unsatisfactory document, suggesting that its authors are not very sure of what they would be after. But when it is viewed in the light of the qualifying riders, the Commissioners are seen to have been really at sixes and sevens. Mr. Chamberlain may possibly extract from parts of it something that will soothe his soul, and enable him to declare with unction that his Merchant Shipping Bill was a much needed and truly statesmanlike proposal. That this was the Commission's principal *raison d'être* is indeed whispered in some quarters. No one will grudge him any satisfaction he may derive from the perusal of its report, but equally few will desire to see Parliament respectfully swallow its suggestions as they stand.

COMPENSATION TO PUBLICANS.

It is a long time now since the view that localities should have the right to say whether public-houses should or should not exist in their midst was first mooted. It would, perhaps, also be not uninteresting if one could give in short detail the various schemes which have at different times been proposed to give effect to this view. It must suffice, however, to refer to the leading points in all such schemes. The first point to be decided was what should be the area of the locality. There were, perhaps, a few who thought

that the area should be the whole kingdom ; but, apart from such visionaries, most temperance reformers were agreed that the area of the localities should be moderate in size, neither too large nor too small,—neither a county nor a parish, unless the one was very small, or the other very populous. On the other hand, the opponents of temperance reform did seriously attack this part of such schemes. In fact, a moderate area is the only possible one. The next point was, whether the public should elect a special body of magistrates to deal with licences, or whether the services of some other elected body, such as a town council, should be utilized for this purpose. The Government on this question have decided to use the services of the about to be constituted county boards ; but whether this will satisfy temperance reformers remains to be seen. Or, rather, it is more correct to say that the Government had so decided, as they have withdrawn the licensing clauses from the Local Government Bill. It will be convenient, however, to refer here to these clauses, as they contain the first detailed attempt to deal with the liquor question. The next point was, assuming that the public was to have the right of closing the public-houses, were they to be allowed to do this at the will of the simple majority merely, or were they only to be able to do so when they obtained a larger majority,—say, a two-thirds majority ? On this question also the Government made up their minds, and in the only possible way, viz. that whatever was to be done, was to be done by the will of the simple majority. The next point was, whether the public were to have the right of shutting up the whole or only a certain number of the public-houses. As to this the Government Bill contained no trace of any check to be put on the discretion of the local authorities. The only other point is, assuming that local authorities are to be appointed with power to close public-houses, are they, as a condition of being allowed to do this, to be obliged to give compensation to the publicans ? In other words, are the publicans to be considered as having a vested interest in their trade ? This question has never assumed much prominence until recently, but now it seems the most important question in the whole subject of drink legislation. The power of deciding whether public-houses are to exist or not is to be given to the localities ; but whether they are, as a condition of being allowed to close them, to give compensation, bids fair to rise to the proportions of a burning question. The Government said Yes, other people say No. Now, it so happens that as innkeepers have attempted to obtain redress in the law Courts from decisions of magistrates to which they objected, this question admits of being argued both as a legal question and also as what is popularly called an equitable one. And though the decision of the legal question does not decide the equitable claim of the publicans, still it is important to know what the law says. The law on this subject is, of course, statutory, and as the English law, on account of the great number of decisions it contains, is much more

developed than ours, it will be advisable to state first the import of its decisions. The leading statute in England is that of 9 Geo. IV. c. 61, the first section of which provides "that the Justices of the Peace are annually to meet for the purpose of granting licences to innkeepers," etc. In interpreting this section, the question has at different times arisen, whether the power to grant a licence implies the power to refuse to grant or renew it when the year for which it was granted had expired. Many people imagined that a renewal of a licence could only be refused if the owner of it had committed a breach of his certificate. As it was convenient for every one that this opinion, if wrong, should be corrected, it has thus most opportunely been recently decided that an application for a renewal of a licence was to be treated—except so far as altered by statute—exactly as an original application, and that the magistrates were entitled to refuse to renew a licence, just as they were entitled to refuse to grant one (*Sharp v. Wakefield and Others, J. P. of Westmoreland, W. N., 5 May 1888*). In this case the magistrates had refused to renew a licence, not because the publican had committed any offence, but on account of "remoteness from police supervision, and the character and "necessities of the neighbourhood." Quarter Sessions confirmed this judgment; and on appeal the Court held that the magistrates were entitled to act as they did. This decision may, of course, be reversed on appeal; but until it is, it must receive effect as a decision of a Court of law. Nor is it the only decision on this question in England. Thus it had been decided in *Bassett v. Godschall*, 3 Wils. 121, that no action of damages lay against magistrates for refusing an application for a licence. They are in the same position as all inferior magistrates. They are judges of all matters within the limits of their jurisdiction, and they are only controlled when they fail to exercise it or exceed it. In licensing matters magistrates have only been interfered with when they failed to comply with the statutes, or failed to judge the case thus. In one case where the magistrates had passed a resolution not to renew or grant any licences, and proceeded thereafter to refuse every application, the Court interfered and ordered them to consider each case on its merits. The law in England thus appears to be—unless the case of *Sharp v. Wakefield* be reversed on appeal, which is most improbable—that the Justices may, if they consider the case—(1) refuse an application for a licence, or (2) refuse to renew a licence. In other words, a licence is simply a permission to trade in exciseable liquors for one year. In this matter the law of Scotland is probably the same as that of England. The Scottish statute is 9 Geo. IV. c. 58, and the enacting words in the first section are the same as those in the English Act; and though there is no direct authority with us, such as *Sharp v. Wakefield* is in England, yet there is a case where the judges expressed views which lead to the conclusion that our

law is the same as that of England. The case is that of *Millar v. Campbell*, 11 D. 355, and the circumstances of it were shortly these:—The pursuer, who was a spirit-dealer, applied as usual for a renewal of his certificate. The Justices offered to renew it if he would allow the condition, "that no spirits should be sold on the premises except over the counter in the shop," to be inserted. He refused to accept the certificate tendered, which contained the above condition. The Justices therefore refused to renew his licence, whereupon he raised an action of declarator, concluding that it was incompetent to insert the condition, and that the Justices should be interdicted from refusing to renew his certificate. This action was dismissed as irrelevant, and at advising the Lord President said: "It is not disputed that the Justices may, at their own good pleasure, refuse to renew or to grant certificates to publicans, they being constituted the sole judges of the expediency or propriety of so granting or refusing." And Lord Jeffrey said: "I have a very distinct impression that there is no power in this Court to interfere with the judgment pronounced by the Justices by any of our forms of action—suspension, advocacy, reduction, or declarator. They have the absolute and irresponsible power of granting or refusing certificates, and in the present case they have exercised that power by refusal. However wrong, however absurd, nay, however criminally wrong their refusal may be, the applicant who is wronged has no means of rectification in the way of getting that judgment of the Justices altered. They may," he however added, "subject themselves to criminal prosecution or to damages if they enter into a conspiracy to oppress the lieges by abusing the uncontrolled power which the Legislature gave them." These remarks would make it appear that the law of Scotland is the same as that of England; and assuming the law as laid down in England is sound, and that our law is the same, the next question is how far the legal answer aids in settling the question, whether publicans have an equitable right to compensation if their licences are taken from them by the new county boards.

Now, one reason why it should not is, that the judge, *i.e.* the licensing authority, is to be reconstituted, and the Legislature expects and intends that the number of public-houses will be reduced by the new licensing committees. On the other hand, it is notorious that no one expects the present Justices of the Peace to do this. It is on account of this, perhaps, that the impression so widely prevails that they have no power to refuse to renew a licence. They were appointed to be, and are supposed to be, impartial. They are, in fact, the judges in licensing matters. This cannot be affirmed of the proposed new authority. They are really appointed to supersede a tribunal which is admittedly impartial, and one strong argument for the change is, that they will be partial and reduce the number of public-houses. And

that there should be no doubt about it, power was expressly given to them to refuse renewals of licences. In these circumstances the owner of licensed premises could well be heard to say: "Be it that under the present law the Justices may refuse the renewal of my licence, and that if they do, I have no redress. Yet they have never done so in any but an extreme case; and under the present law I have invested money in my business, and carried it on in the full belief that it was lawful. You now propose to put my trade under the control of an authority whom you intend and expressly authorize to extinguish or, at least, materially to reduce its extent. If, therefore, you do this without compensating me, I think it would be unfair." And it is no answer to say that at present a licence is only for a year; the real change is in the judges, and not in the matter they judge of.

Again, the force of this argument is not lessened by a consideration that is supposed to operate against it. It is argued that a licence gives to the holder of it a monopoly for the time it lasts; that taking it away merely takes from the owner of a licence a privilege which he enjoyed as a favour, and that nothing is taken from him which he had enjoyed as a right. If, however, this argument be examined, it will be seen that it merely affects the amount of compensation, and not the right or claim to it. Thus, suppose licensed houses were increased to an unlimited extent,—suppose, in fact, there was free trade in liquor, the value of any licensed house would presumably be greatly lessened. But even supposing there were free trade in liquor, and an Act was passed authorizing local authorities to suppress it, the trade would still have a right to object, and a claim for compensation. Therefore the fact that at present licences are a monopoly is no answer to the demand for compensation, though it may afford an answer to the amount that publicans demand. There is another argument against compensation that must also be dismissed. People, while admitting all the legitimate use of intoxicating liquors, point with great force to the terrible curses that drink too often entails by the poverty, misery, and crime it causes. They point with special power to the effects of the present system on people born of drunken parents, and therefore naturally inclined themselves to drink, who are tempted daily by the public-houses they see on their way to and from their work, and who, when they yield to the temptation which the State allows to be in their way, are the helpless victims, and their wives and families the yet more helpless victims, of its insidious power. This argument, however, cannot be used in a self-governing country. A tyrant might use it, and suppress public-houses without compensation; but a free people, who are entitled to manage their own affairs, and who assert their right to do anything they choose, and engage in any trade or occupation they please, provided it is not prevented by law, are under a corresponding obligation not to prevent a class

among themselves from doing the like without compensation. Nor can it be objected to this argument that it is a mere begging the question, that it is just another way of saying that all vested interests must be compensated, and that the question is whether publicans have a vested interest in their licences. This can't be said, because the argument really is that the State can't interfere arbitrarily with any trade, and that to create a body of men with the intention of letting them alter the present state of affairs would be an arbitrary interference with a lawful calling.

As, therefore, there exists no just reason why publicans should be treated exceptionally, and should not receive compensation if their trade is interfered with, the question at once arises, How is this to be done, and what is to be the amount of it? The clauses, which have been withdrawn, proposed that compensation was to be given when the magistrates refused to renew a licence for any other cause than those for which they are at present entitled to refuse it. It has, however, been decided, as we have seen since the Bill was introduced, that the magistrates can refuse any licence if they consider it ought not to be granted. It would seem to follow from this, either that no compensation was due unless the magistrates refused licences in a mass as after a resolution to do so, or that the law was to be changed, and that magistrates would be bound to renew licences or give compensation, unless the publican had committed a contravention of the licensing statutes, and this is probably what was meant. The Bill further provided that where compensation was to be given, its amount was to be the difference in value between the premises as licensed and unlicensed. This scale of compensation is, it must be admitted, extremely liberal; and when the precarious tenure of the right as a legal one is borne in mind, it rather looks as if the amount were too large. Again, it was proposed that the amount should be paid partly by an increase in the licence duty and partly from the local rates of the locality in which the suppression took place. Now, this condition would of course greatly lessen the effect of any restricting statute. No locality would desire to tax itself, and the consequence would probably be that there would be a very slight difference in the number of licensed houses. Compensation from the rates looks as if the publican had a right to a certain sum per annum from the pockets of his neighbours, and this seems unreasonable. It is the country that ought to compensate, if any one has to do it, as it is a matter of national importance that drunkenness should be reduced in amount; and though the matter is referred to the localities for decision, this is a mere method for enabling the nation to carry out its policy, and prevent hardship in the individual case. But why should even the nation be asked to pay the compensation? why should it not come exclusively from the increase in the licence duty, especially considering that though one local board might be elected to

suppress public-houses, its successor might undo its work and grant fresh licences? And though, of course, these would be entitled to no compensation if their licences were in turn taken away, still it seems strange to compensate publicans, while on this assumption the number of licensed houses would be undiminished, or at least would have been restored to their original number. An unobjectionable plan, if it could be carried out, would be that as the publicans have a monopoly, and can compensate themselves for any tax that they were subjected to by increasing the price at which they sell drink, the compensation should be all paid by themselves. They would raise a fund for compensating those of their number whose licences were taken away; and whether this were the sole fund, it ought certainly to be the first fund liable in payment.

There is another plan that has also been mentioned, and that is, that instead of compensating the publicans by a payment down, to make some sort of arrangement as this, viz. to enact that for a certain number of years the magistrates would be unable to refuse to renew a licence, but that after the lapse of the fixed-on period they would be able to do so without any compensation. Such a scheme would be an intimation to the trade that they have a few years in which they can make their money, that they need not invest too much money in their business, and that they should, figuratively speaking, set their house in order, and be prepared to suffer on the morrow following. There seems nothing unfair in this, when we remember the fact that publicans have a monopoly, and that no individual publican has a right to demand a renewal of his licence. The main consideration is to see that they are fairly compensated, and a renewal of their licence for a certain number of years looks as if it would be a very fair mode of doing this. The objection to this plan, of course, would be, that for the period so given to publicans, temperance reform would be delayed. It is fair, however, to point out to those who urge this, the great difficulty there is in settling the liquor question. And as compensation has to be given, it is as well that it should be done so as to affect as little as possible the action of the new magistrates.

As the licensing clauses have been withdrawn from the Local Government Bill, the subject of the mode of granting compensation is not of immediate importance. When similar clauses are reintroduced in a future session, it will be time to criticise the plan that may be proposed. The present is, however, quite a suitable time for urging the justice of the demand for compensation, by showing that the liquor trade is a lawful one, and that it ought not to be arbitrarily interfered with. On the other hand, it would be a great pity if Parliament ultimately decides that the compensation must be paid from the local rates; and the publicans ought to be ready to suggest, or at least accept, a plan for compensating themselves that will avoid this.

THE CIVIL LIST.

IN the May number of the *Contemporary Review* is an article, by Mr. Charles Bradlaugh, M.P., on the Civil List. Its purpose may be stated to be twofold. First, we have a complaint made against the present form of the annual estimates; and second, we have a proposition put forward in regard to the basis on which the Civil List rests.

In so far as the first of these is concerned, nothing new is now proposed. The subject has been raised and already partially discussed in the House of Commons. The paper repeats the contention that whatever the sum granted yearly by Parliament for the maintenance of the Sovereign and the royal household, the amount of the same ought to be plainly and clearly stated "in some parliamentary paper, as easy of access to all as every other official document relating to the national expenditure which has been ordered to be printed by the House." Mr. Bradlaugh again makes the suggestion which he made in the House of Commons, to the effect that the Treasury should present, along with the estimates, an explanatory memorandum which would show the total annual payment in respect of the royal family, with details of the items. At present, he says, there is much diversity of statement as to "the actual cost" of royalty. Some of the items of that cost are scattered through the estimates for the civil service, for the navy, and for the army, respectively, in such a way that they can be discovered only by the aid of skilled knowledge. One might observe, in passing, that the difficulty experienced in this investigation is probably due, not to any intricacy in the shape of the estimates, but to an utterly erroneous meaning attached by the investigator to the word "cost." If "cost," as applied to the royal family, is not only to include gratuitous allowances, as it were, and salaries to the members strictly in their capacity of members of the royal family, but is to be extended and strained to cover also all that they fairly earn, as members of the community at large, for services to the country in the navy, army, etc., it would seem unfair to blame the estimates for the difficulty. This, however, is only by the way. The author of the paper goes on to remark that were the estimates framed with the special object of hiding the total cost of the royal family, the end could scarcely be more effectually attained than it is through the form in which they are at present put before Parliament. Into this complaint and its merits it is not proposed to follow Mr. Bradlaugh. Improvements on the shape of the estimates in several branches have been advocated recently from various quarters of the House of Commons; and, as we are reminded, the Financial Secretary to the Treasury has given "a

qualified assurance" that he will endeavour to have prepared a statement of the nature desired, to accompany the estimates in future. Consequently the complaint will in all probability not have to be renewed.

It is with Mr. Bradlaugh's second purpose that these remarks deal. This is the main purpose of his paper. He propounds, as we have said, an opinion on the historical basis of the Civil List, and this opinion is novel, and, so far as we know, confined to Mr. Bradlaugh himself.

The "Civil List" is the term now used to signify the provision made, both by annual vote of the House of Commons and by appropriation from the Consolidated Fund, for the maintenance of the Sovereign and of Her Majesty's household. The Civil List of Her present Majesty was settled by the Statute 1 Vict. cap. 2, intituled "An Act for the support of Her Majesty's Household, and of the honour and dignity of the Crown of the United Kingdom of Great Britain and Ireland" (23rd December 1837). The amount at which the list was then fixed is £385,000 (sect. 3), with a power to the Queen to grant pensions under certain restrictions (sect. 6), and only to the extent of £1200 annually. The charges which the Sovereign is expected to defray from this allowance are thus limited strictly to Her Majesty's personal expenses and those of the royal household. But when the Civil List was first originated, it was chargeable with much more than these. It embraced also the payment of all civil offices and pensions. Hence its name. Only the departments of the army and the navy were excepted from it; it was chargeable with all the other expenses of Government. Gradually, however, through successive reigns, the Civil List was relieved of all those charges which were unconnected with "the personal comfort and dignity" of the Sovereign. It was only on the accession of William IV. that the last of these disappeared, viz. judicial salaries, diplomatic salaries and pensions, and some others, all of which were really part of the expenses of the civil executive, and did not belong to the royal household. At the same time, it ought to be remembered that as the Civil List has been gradually relieved of this series of heavy charges, it has itself undergone a corresponding diminution in amount. From the sum of £700,000 in the reigns of William III. and of Queen Anne, it has been reduced to the £385,000 of the present reign.

"There is," says Mr. Bradlaugh, "a widespread delusion, shared by the leading members of both political parties, that the amount granted by Parliament for the Civil List is in lieu of certain Crown lands, or their income, surrendered to the public by the Sovereign." It will be generally admitted, we imagine, that this "delusion" is widespread. People who have only read the ordinary books on constitutional history, and have not read Mr. Bradlaugh's paper, are, probably without any exception, labour-

ing under this opinion of which the delusive character has now been discovered. "As," he continues, "this delusion has obtained express statutory sanction in the present reign, it is necessary to trace back the Civil List to its origin in the reign of William III., and through its various stages to the present reign." Mr. Bradlaugh then very rapidly sketches the history of the Civil List since its institution. He contends that there was no surrender of any property or revenues by William III. or by Queen Mary. As individuals, they could inherit nothing from James, "who was still alive, who made no cession to them, and who had an actual heir also living." And as king, William had only a life grant—that made to him as Sovereign by Parliament. The fact that certain revenues had always been described as "hereditary revenues" did not give this king any personal title to these. So also on the accession of Queen Anne. Her Majesty did not succeed to any estate of her royal predecessor in the revenues granted by the Civil List Act. She too had only a life interest; and that was conceded to her by Act of Parliament (1 Anne, cap. 7). So down to the accession of George III. Then, in the Statute 1 Geo. III. cap. 1, is the preamble to which Mr. Bradlaugh ascribes the origin of the delusion referred to. "Your Majesty has been graciously pleased to signify your consent that such disposition might be made of your interest in the hereditary revenues of the Crown as might best conduce to the utility and satisfaction of the public." That recitation is the real culprit to whom the guilt has been brought home. "It is upon these words, which were then so much sheer audacity of invention, that the surrender myth is based and has been built up." In George IV.'s Civil List Act the myth was strengthened in the recital words; and "a most grave change" occurred in the enacting clause. The latter provided that all the hereditary rates, duties, payments, and revenues were to be made part of the Consolidated Fund during the king's life, and that at his death they should be payable to his heirs and successors. This it was, according to Mr. Bradlaugh, that changed that which was formerly only a grant for life to the then reigning Sovereign "into an additional grant of reversion to future monarchs." Then in the case of William IV., the words in the preamble narrating the surrender by the Sovereign are even stronger in the direction of perpetuating the "myth." These, in turn, are improved on by the Act which settles the Civil List of Her present Most Gracious Majesty, and from this enactment "the surrender myth" receives "statutory voucher." We may quote it. The preamble recites seven Acts of the reign of George III. anent the Civil List, three Acts of George IV.'s reign, and two of William IV.'s reign; and then it goes on, "Whereas by the last recited Act" (1 Will. cap. 25) "it was enacted that all the hereditary rates, duties, payments, and revenues in England, Scotland, and Ireland, and other hereditary

rates, duties, and payments as in the said Act mentioned, should be carried to and made part of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, and from and after the decease of His said Majesty King William IV. the same should be payable and paid to His said Majesty's heirs and successors: And whereas the said several hereditary rates, duties, payments, and revenues now belong and are due and payable to Your Most Excellent Majesty," etc. Then the enacting clause (sect. 2) carries all the hereditary revenues to the Consolidated Fund during the life of the Queen, and provides that from and after her death all these said hereditary revenues shall revert to Her Majesty's heirs and successors.

Now, in the first place, Mr. Bradlaugh has not pointed out any inaccuracy in the preamble of this Statute. It narrates only what is true. Its allusion to "those hereditary revenues which were transferred to the public by Your Majesty's immediate predecessor" is perfectly accurate. It describes precisely what took place. King William IV. did transfer these revenues to the public for his lifetime. That the revenues were his to transfer—or rather that a life interest in them for the term of his life was his to convey—cannot be questioned. To demur to it, were to dispute the efficacy of an Act of Parliament. The Civil List Act of George IV. of itself—apart from all prior hereditary title—vested these revenues in William and his successors. What he did was to surrender his life interest in them, in exchange for the provisions of the Civil List, leaving untouched Her present Majesty's reversion in the same, with which last, of course, it was beyond his power to deal. The Act 1 Vict. cap. 2, therefore, accurately sets forth the Queen's title to these hereditary revenues. It may seem that this is sufficient for all practical purposes. An acknowledgment made by Parliament many years ago, and acted on both by Sovereign and Parliament through several successive reigns, will no doubt be an adequate historical basis for the modern arrangement of the Civil List in the eyes of most citizens; and will satisfy lawyers who give effect to such doctrines as positive prescription, *rei interventus*, etc. But Mr. Bradlaugh in this paper is making a historical inquiry into the matter. His contention is that, leaving such questions as these out of account for the present, an error crept in on George III.'s accession. Before that time there were no hereditary revenues vested in the Crown. His Majesty had nothing to surrender in return for the provision then made to him by the nation, and he did surrender nothing. The allowance granted by Parliament was "without valuable consideration" (if we may use the phrase), in so far as revenue was concerned. It was a gratuitously granted salary by that generation of the nation; not a variation of the form of revenue granted to the monarch by former generations, or an augmentation thereof.

We are dealing, accordingly, with historical facts, and not with constitutional theories. The abstract right of Parliament to cancel former unconditional and perpetual grants; the abstract right of a representative assembly, which has attained to real power and become a limiting element in the reformed constitution, to exact from the Sovereign a repudiation and surrender of rights and prerogatives acquired by his predecessors during the days of absolute monarchy, and transmitted to him according to the law of the time,—these things do not concern us here. Only if these rights were actually exercised and prevailed, only as they were actual historical facts, do they count for anything as this line of argument lies.

Mr. Bradlaugh, it seems to us, has failed by any such means to prove that the opinion hitherto prevailing is a "delusion." Apparently he does not deny the existence of hereditary lands and revenues prior to the reign of William III. Speaking of the period before the Revolution, Sir Thomas Erskine May says: "It had been customary for Parliament to grant to the king, at the commencement of each reign, the ordinary revenues of the Crown, which were estimated to provide, in time of peace, for the support of His Majesty's dignity and civil government, and for the public defence. To these were added, from time to time, special grants for extraordinary occasions. The ordinary revenues were derived, first, from the hereditary revenues of the Crown itself, and secondly, from the produce of taxes voted to the king for life. The hereditary revenues consisted of the rents of the Crown lands, of feudal rights, the proceeds of the post-office, and wine licences; and, after the surrender of feudal tenures by Charles II., in 1660, of part of the excise duties." Mr. Bradlaugh does not controvert this. There had been much abuse and waste of the lands and hereditary revenues of the Crown. Charles I. had sold and mortgaged the Crown property when he had failed to get supplies from the House of Commons. After his execution the new Government proceeded in the same way, in order to pay the arrears due to the army. Now, it is to be noticed that at the Restoration these sales by the Parliament were declared void, "and many of the estates of the Crown were recovered." Here we have nothing to do with abstract rights. The Restoration Government cancelled the alienations by the Parliament, and thereby recognised the hereditary character of the property, just as the Parliament by its alienations had recognised the lands as having been the property of the Crown. After the Restoration, through the reigns of Charles II., James II., and William, this waste was continued. During that time fee-farm rents belonging to the Crown were sold, and lands were heavily mortgaged. The Commons grumbled over this. Several bills were brought in to resume all grants of estates made by these monarchs. Mr. Bradlaugh says that the fact of the House of Commons having,

from time to time, ordered the introduction of these bills is "not immaterial, in view of the contention that the Crown lands have been or may be considered as the private property of the monarch." It does not appear to us that the fact has any bearing on the present question. The mistake lies in using the words "private property of the monarch." There is not, so far as we know, any contention that the lands and hereditary revenues in question were or are the private property of the reigning monarch as an individual. The nature of the estate is quite different. The private property of the Sovereign has a statutory recognition of its own, and is quite distinct from these revenues, which are in a sense public revenues. Thus the enactments 39 & 40 Geo. III. cap. 88, and 4 Geo. IV. cap. 18, refer to the former. The Act of Queen Anne prohibited grants of the land revenues of the Crown. In consequence of the restrictions thereby created, it was, oddly enough, considered necessary to declare that private property of the Sovereign, acquired by purchase, gift, or descent from persons not being kings or queens of the realm, could be disposed of like the property of subjects. The hereditary revenues of the Crown are quite on a different footing. Any Sovereign's rights therein are now necessarily limited to enjoyment for life. But it may be said that the limitations and restrictions which were introduced by Statute about two centuries ago only put them on the footing of a strict entail. Moreover, in so placing them statutorily, Parliament was only adapting the letter to the spirit of the estate. The revenues were the property of the Sovereign as Sovereign, and not as an individual—a kind of estate familiar enough, from its frequency in humbler walks of life, to the lay mind. But though of this limited character, the estate in the revenues was none the less hereditary; and the fact that the Commons sought to prevent waste, as it were, to no extent detracts from, but seems to arise from and to confirm, their hereditary character. It is to be remembered that, as we have stated, there had been an actual revocation of the alienations of the Crown lands; yet Mr. Bradlaugh does not appear to regard that as material to the question of their being hereditary.

The contention that William III. could not succeed to these hereditary revenues because James II. was still living, is, we say it with deference, merely a quibble. James II. had *de facto* ceased to be king. The estates, whatever their nature, which had been vested in him as king, terminated with the termination of his reign. Had he been naturally dead he could not have been more completely divested of them. In this respect, therefore, there was no obstacle to prevent the Sovereign's estates in the hereditary revenues from passing to William. Nor have we been shown any other impediment. It is true that William did not succeed James in the ordinary way. But neither in the nature

of his accession to the position of king, nor in the manner of it, was there anything to preclude his succeeding as Sovereign to the hereditary revenues of the Sovereign. So in the case of George I. "He had no rights whatever of heritage by descent," says Mr. Bradlaugh. "His succession as king was solely founded on the Act of Settlement." That is true. But it in no way bears out his contention. He quotes, as in favour of that contention, a declaration of the Speaker on the occasion of the Address from the Commons to George I., which appears to put quite the opposite case. It is this: "That when His Majesty shall please to answer the impatient desires of his people by coming to take possession of his kingdoms, he will find himself equally established in these revenues as if he had succeeded to all by an uninterrupted right of inheritance; the only difference is this, that if he had inherited them he would have wanted one single proof of the duty and affection and unanimity of his subjects." Does this not, for what it is worth, confirm the "delusion" that these hereditary revenues are the property of the Sovereign *qua* Sovereign—so much so, that the mode of the Sovereign's succession in no way impairs their hereditary character?

A STRANGE RENCONTRE.

A FEW years ago the public of Scotland were made familiar with the particulars of a divorce case, the history of which was of the most conventional character, and which excited notice only because the parties belonged to a class of society in which in Scotland divorce is most rare—the upper middle class. The facts of the case as elicited at the trial of the cause, which was undefended, were as follows:—The pursuer, M., a civil engineer in Glasgow, resided during the summer with his wife and two children at a villa residence at L., on the Clyde. Having been called to London to attend before a Parliamentary Committee, he was detained there for several weeks. On his return he was led to make inquiries about the frequent visits to his house during his absence of a Dr. N., an old friend of his wife, but with whom he had himself been previously unacquainted. The result was the divorce proceedings. It was proved by the servants that Dr. N. had visited the house daily during M.'s absence, and that on the two nights before M.'s return he had stayed till between five and six in the morning. Decree of divorce was granted. There was, however, one passage in the evidence of one of the servants which has some interest, as bearing upon the following narrative:—

"I recollect one day, three or four days before Mr. M. returned home, a stranger gentleman called and asked for Mr. M. I did

not know the gentleman. I had never seen him before, and I forget what name he gave. When I told him Mr. M. was from home he seemed much disappointed, and asked for Mrs. M. Mrs. M. and Dr. N. were in the drawing-room at the time. I showed the stranger gentleman up. Mrs. M. and Doctor N. were sitting together on the sofa when I opened the door. Dr. N. had hold of Mrs. M.'s hand. Mrs. M. started up and looked confused, but I did not catch what she said. The stranger gentleman stayed only a few minutes. I showed him out. He seemed annoyed. He asked when Mr. M. was expected back. I said I did not know. He then asked if I knew his address, and I said I had seen letters addressed 'Charing Cross Hotel, London.'

A few months ago I met M., who has now retired from business, and resides generally on the Continent, at the Hotel Beau Rivage, Ouchy. After dinner, in the smoking-room, the conversation among a small party of English and American visitors turned upon "Death Wraiths," the immediate occasioning cause of the discussion being an article, "Where are the Letters?" by Mr. Taylor Innes, in the *Nineteenth Century*. There is generally a sceptic present at such discussions, but this case was an exception, for the only sceptic who was a party to the argument was the absent Mr. Taylor Innes. Various theories, it is true, were propounded, but the talkers were all on the side of the angels, and they all agreed, if in nothing else, in disagreeing with Mr. Taylor Innes. "Would," I thought, "that that iconoclast were present; how his combative nature would glory in such opposition!" There was, however, one difficulty which all admitted. On a psychical theory of the universe the appearance of wraiths at death is not incredible, or even perhaps very improbable. But the wraiths do not always appear at death—sometimes they come days before; and it is hard to explain, upon any theory at once hyperphysical and rational, how or why the wraith of somebody who is still alive, and perhaps well, but is to die to-morrow or next day,—it may be by a pure accident,—should manifest itself to an absent friend.

The coffee and cigars had been discussed, the party had broken up, and I strolled out with M. in the moonlight along the border of the lake. It was a lovely evening, and as we had not met for years he had many things to tell me about his travels, and still more to ask about friends at home. At last he came to the subject which seemed to be most on his mind, and in a sad, wistful way he asked me gently what I had heard or knew of the movements of his lost wife. (I believe the good fellow pays her a regular allowance.) I told him what I knew, and he went on,—

"Do you know, I could not help thinking of her when we were arguing there just now; and I'll tell you a curious story bearing directly upon the subject we were discussing, which, of course, I

could not tell to these fellows. I had been up in London on parliamentary business for more than a fortnight. One evening I arranged with two friends to go to the theatre, the Savoy—'Pinafore,' I think. After the play we supped somewhere in the Strand, and at supper we were joined by arrangement by a fourth friend, a press leader-writer, who had been unable to get away in time for the play. After supper the pressman suggested a game of whist at his house in Mornington Crescent, Hampstead Road, behind Euston Station. I, a plain provincial, rather demurred to setting out at midnight to drive half-way across London; but the others were all on, and not to spoil the rubber I agreed to go. We hansomed it out, and in half-an-hour the first deal of the cards was round. We played for more than two hours—sixpenny points, and a shilling on the rub. In the last rubber we played I made a foolish blunder. Nobody noticed it; but the result was a treble and the rub against me and my partner. We turned out about three o'clock, my friends assuring me that we should soon find hansoms. They were right; for we had not gone a hundred yards when one overtook us. The two others were going together in the same direction—westwards, and I insisted that they should take the hansom. I should certainly find one on the Euston Road. We said good-night; they whirled away, and I walked on. I had formed a desperate resolution: I should walk every inch of the way to my bedroom in Charing Cross Hotel. In my young days, when I was poor, I had formed a habit of mortifying myself. Whenever I had thrown away money by some foolishness or mistake, I deliberately denied myself something—you would hardly think it, but sometimes even food—to make up the loss. I found this practice an excellent consoler. Well, the habit had stuck to me, and I followed it now. By that unlucky mistake at cards I had perhaps thrown away half-a-crown. I could not well offer a cabby less to drive me to Charing Cross, so by walking all the way I should atone for the blunder.

"I was too tired to enjoy it; but under favourable conditions a prowler round London between two and four in the morning well repays the trouble. The streets are never quite deserted. The yesterday meets the morrow; the late prowlers of the night encounter the early birds of the morning. At all hours, too, there are people—decent-looking people—standing here and there at the doors and corners quietly conversing as though they never went to bed. In the great arterial streets, again, one encounters an endless train of trundling waggons rolling marketwards, the arrest of which for a single night would bring famine to millions on the morrow.

"But I hurried on regardless, in no mood to study social or economical problems. I had crossed the Euston Road, and was proceeding down Tottenham Court Road on the west side of the pavement, when in crossing the end of a side street—Goodge

Street, you won't know it—I observed a man, who apparently had been crouching in the shadow of a doorway on the south side of Goodge Street, sally forth and come rapidly towards me.

“He came so straight for me that I had no doubt he meant mischief; and being, as you know, a fellow of pretty decisive resolution, not likely to wait for the first blow on an emergency, I raised my stick and would certainly have hit him full on the temples; but he started back.

“‘Stop; I’ve had enough of that to-night, Frank.’

“It was my cousin and old school-fellow, Tom S.

“‘Good gracious, Tom; you here! But what’s up; you’ve had enough of what?’

“‘Oh! the confounded brute kicked me on the head. Don’t you see my ear’s swollen?’

“‘Bless me, Tom, so it is; you must be suffering dreadfully.’

“‘No, I’m not suffering at all; so don’t mind me just now. I’ve been waiting here for you. I want to tell you something very particularly that concerns yourself, Frank. Go home to L. at once. There’s something far wrong, I fear, there. I cannot say more; but go home at once; you may not even yet be too late.’

“He looked me straight in the face, and spoke with extraordinary earnestness and feeling. I saw the tears standing in his eyes.

“‘Good heavens, Tom, explain yourself! What’s wrong?’

“‘No, Frank, not a word more from me. Go home. Go home. Farewell!’ and he turned and left me.

“‘Stop!’ I cried; but he paid no heed, and I darted across the Tottenham Court Road after him. He started to run, and I followed in hot pursuit back along the east pavement of the road. Now, when we were at Merchiston, I broke the record for the quarter-mile, and Tom was always a mere duffer at games. But he seemed to have improved wonderfully, for I could not catch him; he actually drew away from me.

“‘Never mind,’ I muttered, ‘he can’t stay. Bother the fellow, I’ll teach him a thing or two in running;’ so I put down my head and pegged away. At the corner of Francis Street, being now more than thirty yards ahead of me, he turned to the right, and when I reached the corner I could not see him. He seemed to have turned into some doorway just round the corner. I met a policeman coming along Francis Street, and I asked him if he had seen any one running. He replied in the negative, and asked me if I had been robbed. I said that I had not, and muttered something about trying to overtake a friend. The man held his lantern to my face and looked at me hard; and such unpleasant visions of the cells, or possibly Colney Hatch, arose before me, that I was glad when he moved on and left me free to resume my tramp to Charing Cross.

“This adventure singularly perplexed and disquieted me. My cousin Tom had always been a little eccentric and different from other people. He never mixed much with men; he had no calling, but

lived quietly at home with his mother, who had considerable means, at a small place which she owned in Forfarshire. His chief interest was farming, and he had some good pedigree stock, both in black cattle and Clydesdales. Amongst all his friends he was deemed a little odd, but with the few who knew him well he was most popular, for he was the best hearted fellow in the world. But how did he come to meet me and give me that mysterious warning in Goodge Street, Tottenham Court Road? He said he had been waiting for me, and he seemed to recognise me a long way off. But I was unaware before that he even knew I was in London; and, granted I was in London, it was hundreds to one against my being out walking at 3.30 in the morning, and thousands if not millions to one against my crossing Goodge Street, Tottenham Court Road, at that hour. 'Waiting for me!' Why, *à priori*, one might just as well stand in Sauchiehall Street waiting for Bismarck! And the injunction to go home! what was to be made of that? My wife was, as I thought, the most careful and anxious person in the world, and I had had a letter from her only a few hours before written in the best of spirits. Surely she would have let me know at once if anything was wrong. Then his eccentric address, the swollen ear, and the sudden disappearance, all combined to make me think that poor Tom was off his head, or had very much forgotten himself (though he didn't run like that), and to attach less importance than I would otherwise have done to his mysterious warning. In any case I had plenty of time to telegraph and get a reply before the last Scotch express left in the morning, so I made up my mind not to act at once on Tom's mysterious advice.

"I had a few hours' sleep, and at eight I rose and despatched the following telegram to my wife, paying for a reply:—

"'Sorry still detained; can come down for a day if anything pressing. Wire if all is well.'

"In less than an hour I had a reply back:—

"'All well and flourishing. No need to hurry.'

"This entirely reassured me, and yet I did not quite like my wife's telegram. I had not the faintest suspicion of any wrong on her part, but that 'no need to hurry' hurt me a little. It was not just like the dear girl, who used to be so impatient to have me home. I consoled myself, however, by thinking it was only an unfortunate expression, and was meant to put me at my ease. I wrote a guarded letter to my cousin Helen, Tom's sister, saying that I believed Tom was in London, and I would be glad to have his address; but, as I might go home any day, she had better write under cover to my wife.

"I stayed in London two days longer, and then went home, travelling by the day train. I got away at the last sooner than I had expected, and my wife was not looking for me until the following morning. I meant to give her a surprise. On my

arrival I found her at dinner with Dr. N., whom she introduced as a very old friend. I was somewhat surprised, for I had never even heard her mention Dr. N.'s name; and it was not just like my wife, usually so self-contained and circumspect, to entertain even a very old friend to dinner in my absence. I had pictured her dining quietly with the children at one, and had bargained for nothing better than high tea for myself. However, I thought no evil, and I joined them at table. By and by in the course of conversation my wife asked me what I meant by frightening her with a telegram at eight in the morning, it was so unlike me.

"‘Ah!’ I replied, ‘thereby hangs a tale. I heard a strange report of your doings from Tom.’

"I looked up at my wife, and, to my surprise, at the mention of Tom's name her face became purple with confusion, then ashy pale, and then purply blue again. I was shocked, for I supposed that she fancied I resented the doctor's presence, and meant to insult her before the stranger. I glanced at the doctor, but he had dropped his napkin, and was stooping to pick it up.

"‘What do you mean, Frank?’ began my wife, when she had partially recovered, and she spoke in a hyenaish tone I had never heard from her lips before. ‘Had you a letter from Tom?’

"‘Bless me, no, my dear! I'm only joking, I met Tom in London.’

"It was my wife's turn to look surprised now.

"‘In London! When?’

"‘Two days ago.’

"‘That's quite impossible; Tom was here on Tuesday, and he has been at home ever since. He is very ill, a horse kicked him.’

"‘He may be ill, but he was in London on Tuesday night.’

"‘Nonsense. I'd a letter to you under cover to me from Helen this very morning. I'll just get it;’ and she rose and left the room.

"My wife was back in a moment with the letter, which was as follows:—

"‘*Thursday.*

"‘MY DEAR FRANK,—I have your letter. Poor Tom is not in London, but in bed here very ill. He was much disappointed at not finding you at home at L. on Tuesday, and when he came back he unexpectedly announced his intention of going up to London next morning. But in the middle of the night he was called out to see one of the mares, which was ill, and whilst doctoring it he got a dreadful kick on the side of the head. He was brought in insensible, and has never spoken since. The doctors still hold out hopes. My mother bears up wonderfully, but we are in a sore way.—Your affectionate cousin,

HELEN S.’

"I made up my mind to go through to Forfarshire next day to see how matters stood, and if I could be of any use to my aunt. I

started early, and on the way to the station I called at the post office for letters. There was a black-edged sheet amongst them, and I tore it open and read:—

“‘SIR,—The favour of your company is requested to attend the funeral of my son Thomas S., who died here this forenoon at half-past eleven o’clock, to the place of interment in W. churchyard, on Tuesday next at one o’clock.—I am, Sir, your obedient servant,

“‘MILDRED S.

“‘*Friday, 10th April 18—.*’

“Well, of course you know the rest of my sad story. But to my grave I shall carry the bitter reproach that I did not obey Tom’s summons home. Even then I might have been in time to save the mother of my children. My God! I love her yet.”

The Month.

NOTES FROM LONDON.

It is rumoured that Lord Esher, Master of the Rolls, will shortly retire, and that Sir Richard Webster, the Attorney-General, will take his place. Sir Edward Clarke will, no doubt, expect promotion, and Mr. Finlay would make an excellent Solicitor-General.

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AN important case, involving the legality of trade boycotting, was argued before the Lord Chief Justice many months ago. A decision was expected before Easter, but Trinity term has come, the judges will soon be away on circuit, and no judgment has yet been pronounced; this is an interesting gloss on the meaning of *curia advisari vult*, in England.

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THE galaxy of ladies who sparkled in the gallery of the House of Commons during the recent debate on the Contagious Diseases Acts in India, deserved the rebuke once administered by a learned judge—*on dit* Mr. Justice Wills—to a row of their sisters at the Old Bailey:—

Medical Witness—My lord, I hardly care to be more explicit in the presence of ladies.

Mr. Justice Wills—Go on, sir, there are no ladies present.

IN Mr. Henry Bartlett, C.B., Auditor of the Gold Coast Colony, who died last month on board ship off the West Coast of Africa,—but not, I understand, from malaria,—the Colonial Office has lost a valuable servant. Mr. Bartlett served with distinction in Western Africa, 1844–46; in Kaffraria; in the Crimea, 1854–55; and in New Zealand, 1860–61, 1863–65.

* * *

MR. HUTCHINSON, a barrister of about nine years' standing, has been appointed Queen's Advocate of the Gold Coast Colony.

Literary and Dramatic Copyright.—The struggle of literature with the drama, which has slumbered for some thirty years, has been revived, and the victory which has hitherto followed the banners of the drama has deserted them, and belongs to literature. The period of peace was largely due to the fact that the literature which was tempting to the dramatist was generally that of some well-known author who anticipated the dramatic plagiarist by turning his ideas into a play before he published his book. The success of Mrs. Burnett's *Little Lord Fontleroy*, or its adaptability to the stage, was not so clearly seen as to suggest these precautions, and nothing appears to have been done except to put "All rights reserved" on the title-page, which are a waste of ink. When, therefore, on being informed by Mr. Seebohm that he was doing her the honour of dramatizing her book, Mrs. Burnett protested, she was naturally met by the answer that "by English law any one may adapt for stage representation any novel, story, or tale." That statement, subject to the reservation that the tale has not already been dramatized, represents the view entertained by lawyers of the law of the subject, ever since the case of *It is Never Too Late to Mend* was decided by Chief Justice Erle and Justices Williams and Keating in the year 1861. The only hope, therefore, that the right of dramatizing might be reserved to the author, was in the phrases of Mrs. Burnett's telegram—"Have dramatized," and letter—"I have begun to dramatize the story myself." For any part of the story which the authoress had dramatized before Mr. Seebohm she could have obtained an injunction; but it would seem that Mrs. Burnett began too late, as she sued only in respect of her literary copyright, which, it was maintained, was infringed in the course of preparing for the dramatic representation. In this she has been unexpectedly successful. Mr. Justice Stirling has ordered the defendant to state on oath what copies of the work exist; secondly, to extract from the copies in his possession or power, and deliver to the plaintiff, all passages copied, taken, or colourably imitated from the plaintiff's book; and, thirdly, produce to the plaintiff for examination the copies after the pirated passages have been extracted. This order

seems to have been so embarrassing to Mr. Seebohm that he has withdrawn his play; and, therefore, we may take it that, if the decision be right, practically a dramatic copyright is secured to the author of a tale if it is adapted and put on the stage as Mr. Seebohm adapted this piece.

All who have the interests of literature and the drama at heart will sympathize with the decision of Mr. Justice Stirling. They will also be impressed with the ability of his judgment; but at the same time they will criticise his reasoning closely. The plaintiff, it was plain, had no dramatic copyright in the technical sense of the word. She had only a literary copyright, which it was alleged had been infringed by making four copies by hand or by type-writer. The right conferred by the Act is "the sole and exclusive liberty of printing or otherwise multiplying copies." If Mr. Justice Stirling is right in holding that four copies are a "multiplication" within the meaning of the section, the production of one copy is a multiplication. Therefore it is an infringement of copyright to put an extract from Mrs. Burnett in an album. This seems a reduction to an absurdity. No distinction can be drawn between type-writing and hand-writing, as, so far as multiplying is concerned, one only differs from the other according to the skill of the writer. Either is a mode of obtaining an indefinite multiplication of copies, by printing them from a permanent source, which has hitherto been considered as the limit of the privilege. Mr. Justice Stirling appeals to the statutes of Anne and George III., which provide only for "printing," while the statute of Victoria adds "otherwise multiplying copies." This looks intended, not, as he assumes, to make any form of multiplication illegal, but to add to the offence those forms of multiplying such as the common object of the office, the copying-press, which had come into vogue since George III., and which might take the place of printing. Again, assuming that the plaintiff was entitled to nominal damages, Mr. Justice Stirling, so far as at present reported, does not deal with the question whether he may look at the object beyond the production of the four copies. *Read v. Conquest*, 30 Law J. Rep. C. P. 209, already referred to, is still good law, and it lays down that a dramatist may annex the words and plot of a novelist who has not dramatized his tale, without being guilty of a breach of copyright at common law or by statute. Can this right be destroyed by treating as serious an infringement of literary copyright which, if that form of infringement alone were in question, would be of a character absolutely without damage to the author? Farther, is the order for the delivery of the copies justified by the statute? The question turns on section 23 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), which provides that all copies of any book wherein there shall be any copyright, and which shall have been unlawfully printed, shall be deemed to be the property of the proprietor, who shall, after demand thereof

in writing, be entitled to sue for and recover the same, or damages for their detention in an action of detinue, or for conversion in an action of trover. So far as we know, this is the only section of the Act or rule of law giving a judge jurisdiction over pirated copies of books. As it forfeits the property of the owner of the book, it must be strictly interpreted. Assuming that the written notice had been given, and that Mr. Justice Stirling treated the action as an action of detinue, had the copies been "unlawfully printed"? The word here used plainly does not include manuscript or type-writing, and it throws a light on the rest of the Act, suggesting that infringements by printing or multiplying processes were alone dealt with by the Act.

Mr. Justice Stirling's decision, of course, did not in any way prevent Mr. Seebohm continuing his performance, if he could do so after throwing his four books into the fire, and his actors knew their "words" sufficiently well to do without a book. As to the Lord Chamberlain's licence, it was not in any way imperilled by his copy of the play being surrendered to Mrs. Burnett. Licences are usually granted for portions of a year, and always end on September 29. The licence is in force except on the wilful infringement of certain rules, of which rule 13 alone is material, and which requires a copy of every new piece to be forwarded for licence to the examiner of plays seven clear days before production, and no alteration of the text is to be permitted without sanction. There is no condition forfeiting either the licence of the house or of the play if the book of the play, which has once been duly deposited, disappears, and except for an infringement of the rules or for disorder, the licence of the theatre cannot be forfeited. It is true that by section 12 of the Act of 1843 the Lord Chamberlain may disallow any play, but it was never intended that he should do so to assist one party to a litigation.—*Law Journal*.

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Limited Liability.—There is danger that, in the outcry made by interested parties and rendered possible by a few unscrupulous promoters, a great and powerful instrument of commerce may be destroyed, or so tampered with as to be rendered almost practically useless. Already a Bill to effect more or less drastic changes in the law relating to limited liability Companies, is said to be in the hands of the Lord Chancellor for introduction in the Upper House. It may therefore be of some advantage if at this stage, and before it is too late, we point out a few important considerations. The thousands of industries that are now flourishing in all parts of the world, and which are maintained and worked at a profit by the capital which in the period prior to limited liability was locked up at Banking establishments, paying the owners a minimum of interest and in many cases nothing at all, are sufficient to indicate the commercial successes which directly

resulted from the Acts. We can readily understand that from the point of view of a banker, or other trading capitalist, the comparative facility with which persons with small surpluses are enabled to combine to carry on large operations do not meet with approval. The bankers now no longer hold abnormally large current or deposit accounts of their clients, because as soon as a man's bank surplus is above his requirements, although he be not a trader, and be ignorant of the operations of trade, he can yet reap the profits of trade, by becoming a partner in an incorporated concern, and get the advantage of the technical knowledge of his partners without the risk of involving himself in unknown responsibilities and trade debts, and without even sacrificing any of the status which his otherwise engaging in trade would occasion. The immense boon of the Acts to the professional classes ought not to be overlooked. Clergymen, barristers, doctors, literary men, *et hoc genus omne*, would have to be again content with leaving their accumulations at the most at 1 per cent., or even as in old days at no per cent. at all, the trouble of keeping their accounts being represented as sufficient consideration for the use of their money by their bankers.

That bankers (nearly all of whom have incorporated themselves under the Acts), and other traders who have climbed the giddiest heights of success by means of the present law, should be anxious to kick away the ladder and so prevent any rivals climbing up to their skies, is intelligible enough; but the public should be made aware of the interested motives which would decry a great and necessary machinery, because, like everything else in this world, it is abused, and because a few unscrupulous persons "out of good still find means of evil."

But, say opponents: Any seven paupers out of the workhouse could combine together to carry on business. Now, taking this to be true, we say, Why not? why should not seven persons supposing themselves possessed of skill and energy to work or carry on a trade appeal to other seven or seven thousand people to extend the combination, and help the venture with their capital? If the seven other people choose to be idiots enough, or are unfortunate enough, to buy a palpably rotten concern, how can you, in order to help them, attack with prudence the doctrine *caveat emptor*? For deceit or fraud, the law is just as far-reaching in the case of public companies as in any other case.

So much for the investor. But when we come to the over-much and absurdly-pitied creditor of the company, we utterly fail to see his grievance. The doctrine that we can only help *vigilantibus non dormientibus* is by no means confined or confinable to a court of equity, but will be found to be applicable to all the affairs of life. Why should the creditor of a company be supposed not to exercise the ordinary care that he would do if he were dealing with a private person? He can refuse to deal with the company

except for cash, or unless the debt is guaranteed; but the law has, indeed, given him this advantage—that it discloses the state of the company to any inquiring person on payment of one shilling.

Having said thus much, in the hope that considerable caution will be used in legislating on the subject, it is not necessary for us to deny that it is possible we may not have already reached perfection in the law as it at present stands; and that the resources and ingenuity of legislators should be exercised to keep pace with the artifices of schemers, who proverbially declare themselves able to drive a coach and horses through any Act of Parliament. We agree that promoters should be compelled to be more definite in their statements of the objects and pretensions of their proposed company. Then comes the question of directors. On this point we cordially agree with that eminent jurist and practical legislator, Lord Bramwell, in his address to the Bankers' Institute last week, that the holdings of directors should be of a substantial amount. As matters stand at the present moment, in a great many cases the director is a mere figurehead, or, worse still, a decoy-duck, holding a very small pecuniary interest (most probably gratuitously presented to him) in the company, and, consequently, having little concern in the success of the venture beyond the pouching of his fees. The stimulus thus applied would lead to more honest exertion on the part of the directors, and would, to a considerable extent, insure the general body of shareholders against mismanagement. It is urged against this that such an alteration would drive out the most useful of all directors. There may be a great deal to be said from this point of view, but, at the same time, past experience teaches us that in the majority of insolvent companies it has been proved that the directors' holdings have been comparatively *nil*, and consequently the whole of the losses have fallen upon the shoulders of those outside the board of management. Lord Bramwell made a very important suggestion when he proposed to transfer the winding-up of public companies to the Bankruptcy Court; and though the proposal of Mr. Whinney, the President of the Institute of Chartered Accountants, that the Court of Chancery would be the proper channel through which to deal with insolvent companies, appeared to meet with most favour, we think the weight of legal opinion would be on the side of Lord Bramwell. What is "sauce for the goose is sauce for the gander;" and if it is required of a bankrupt individual to undergo a public examination as to the reasons of his insolvency, it would only appear natural that unfortunate companies should be submitted to a similar process.

Finally, we must emphasize that the law of limited liability, though capable of improvement, cannot be materially altered with advantage, nor, indeed, without danger of striking such a material blow at the commercial enterprise of English citizens as to handi-

cap them in their commerce and industry in rivalry with other nations. Whatever amendments may be deemed necessary, we must take care to leave the principle of freedom of contract unassailed.—*Pump Court.*

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A Substitute for Hanging.—We have before us the report of a commission appointed under a recent statute of New York “to investigate and report the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.” The caption of the statute suggests the humorous inquiry, What would be the most humane and practical method known to modern science of carrying into effect the sentence of death in cases which are not capital? The commission consisted of Elbridge T. Gerry, Alfred P. Southwick, and Matthew Hale. In their report, which fills a hundred large octavo pages, they have taken up and discussed no less than thirty-four different violent methods of shuffling off this mortal coil, and they finally recommend the enactment of a statute reciting that “the punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until the convict is dead.” This solemn discussion of thirty-four different methods of putting an end to the life of a creature who has put an end to the life of some one else, without giving his victim any choice in the method of execution, forces upon the mind by comparison the recollection of a celebrated chapter of Rabelais, devoted entirely to the discussion of the best material to be used for a certain purpose. Rabelais concluded by recommending the softest and downiest substance of which he could conceive; and this commission recommends a mode of death which expert testimony pronounces not only painless, but an absolute luxury. The whole discussion shows into what an age of sickly sentimentality and drivel our civilisation is descending. One of the objects of the law, in inflicting capital punishment by hanging, is and should be to deter the commission of murder by visiting upon its perpetrator the punishment of death inflicted in a revolting manner. But if it is to be inflicted in a mild manner, it should be said that a current of electricity, in bungling hands, might be the most horrible torture which could be inflicted upon the convict. An extremely simple mode of execution would be drowning. Put the murderer into an iron cage, sink him into a vat of water, and there drown him like a rat. Death by drowning is known to be painless, save for the first few moments of strangulation. Many persons have passed through the painful stage of it, and, after remaining unconscious for a considerable time, even for hours in some cases, have been resuscitated, the resuscitation producing great agony. There are crimes which are not even capital by our

law, which ought to be punished by an even more revolting death than that of hanging. At the very time of this writing our daily newspapers chronicle the fact that a medical man decoyed a miserable woman into his power and broke a bottle of carbolic acid over her head. Vitriol-throwing is an offence of so fiendish a character that burning at the stake would scarcely be too severe a punishment for it; yet under our law it is not even capital. Murders accomplished by the so-called "modern agencies of civilisation," such as dynamite, ought to fall into the same category.—*American Law Review*.

* * *

WE have been pining for a funny case (says the *Albany Law Journal*), and one comes opportunely from Texas. In *M'Allen v. Western Union Tel. Co.*, Texas Supreme Court, March 20, 1888. it was held that plaintiff's mental sufferings and apprehensions upon not being met at the station by the family carriage, which he had ordered by telegram upon hearing of his father's illness, are not a proper element of damages; and also that damages for bruises alleged to have been received in consequence of plaintiff's being obliged to take a rough vehicle, instead of the family carriage, to a certain point, are too remote. Judge Maltbie, apparently in a merry mood, said: "The carriage had not arrived. It was only seventy-five miles from that point to the home of his father by the usual travelled route; but no conveyance could be obtained, and he was compelled to take passage in a 'jerkey' and on a 'buckboard,' and by way of Rio Grande City to Edinburgh, a distance of about two hundred miles. It was alleged that when plaintiff realized the fact that the family carriage had not been sent to Pena, his mind became possessed with dreadful forebodings as to the cause of its not being there. He had learned while in San Antonio that his father was sick, and this was the occasion of the despatch for the carriage, though the defendant was not informed of this or any other reason for the sending of the message. During the entire journey from Pena plaintiff's mind was racked with doubt and uncertainty as to his parent's condition, suffering the most excruciating agony for fear some dreadful calamity had befallen him. It was further averred that plaintiff was severely battered and bruised by the jars and jolts of the 'jerkey' and 'buckboard,' inflicting great physical pain and suffering upon him. . . . Had it been a fact that no other conveyance could be procured from Pena to Edinburgh except such as those upon which plaintiff took passage, it could not have been anticipated that in the usual course of such a journey plaintiff's posterior would become bruised or lacerated to such an extent as to cause serious physical pain. . . . In this case it seems that the plaintiff's mental anguish was not the result of any real or adequate cause. It does not appear that the father was dead, or in such condition as demanded

the personal presence or attention of his son. On the contrary, the sorrows of the plaintiff were imaginary, and were caused by the failure on the part of the father to send the carriage to Pena, which the affectionate son attributed to the fact that the father was dead, or too dangerously ill to attend to ordinary business, when in truth the failure was due solely to the fact that no request to send forward the carriage had been received. The deduction of the son was not logical, or at all events the occurrence might have been well accounted for on other hypotheses than the disability of the father. If grief or sorrow produced by things unreal, mere pigments of the brain, are held to give a cause of action for a breach of a contract or a tort, an individual of a sombre, gloomy imagination would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy, for the same breach of duty, would not be entitled to anything; and damages, instead of being measured by the rules of law as applied to the rule of facts, would largely depend upon the fertility of the imagination of the suitor." But for all this we think it would be no joke to be condemned to an unnecessary ride of one hundred and twenty-five miles over a Texas road on a "jerkey." How can the judge say the plaintiff's pains were too "remote"? We should think them very near if we had suffered them.

* *

A MANDATORY, in the ordinary case, has no power to compromise an action. He is there for the purpose of acting as security in the matter of expenses, and of seeing that the action is carried on. Such is the import of the decision in *Thom v. Bain*, March 20, 1888, First Division.

* *

ACCORDING to Lord McLaren, a deserted wife of an Englishman, although herself Scottish by birth, cannot acquire a domicile in Scotland so as to avail herself of the facilities for divorce afforded by our law to persons in her unfortunate position. *Redding v. Redding*, March 22, 1888.

* *

THE Lords of Justiciary have been dealing with a number of new points relating to criminal law recently. In *Campbell v. McLennan* (March 20) they have declared the following charge to be irrelevant: "Having found in money one pound, he did deny having found the same, and did appropriate and then steal the same." Lord Young's remarks go the length of throwing doubt upon the legal nature of the act of appropriating found money—except at least in cases where the true owner was known. Lord Rutherford Clark has more than once of late differed from his brethren, and with, we think, good cause. He did so in this

case. "The complaint," he said, "states merely these two facts—that the accused found a £1 note, and that he appropriated it to his own use. Under the new Act 'appropriate' is to be read as 'feloniously appropriate,' but that really is of no importance, for if a person finds a £1 note and appropriates it to his own use, I think that is plainly theft and nothing else."



AT the recent Aberdeen Circuit Lord M'Laren rejected a prisoner's declaration because the magistrates had not informed her of her rights under section 17 of the Criminal Procedure Act. But his lordship said, "I desire to guard myself against laying down any rule that it is the duty of the sheriff or of the police to inform the prisoner that he is entitled to the services of an agent." *H.M. Advocate v. Goodall*, May 3, 1888.



IN *Dingwall v. H.M. Advocate*, May 26, 1888, the same judge, along with Lord Young, rejected an indictment because of the omission of the words "falsely and fraudulently." This decision seems to be directly against section 8 of the new statute, which provides that it shall not be necessary to allege that any act has been done "falsely and fraudulently." Certainly we had thought that at last we had got rid of all such pompous words. But it appears that this is not so easy. Lord M'Laren, while admitting that it was an improvement to get rid of unnecessary words, held that where falsehood and fraud are necessary ingredients in the crime charged, falsehood and fraud must be set forth in the libel. *Per* Lord Young: "It is extravagant to my mind to say that if falsehood and fraud are essential to make the act charged a crime, 'falsely and fraudulently' may be omitted from the charge. Will any one give me a good reason why these words should be omitted? There are plenty of superfluous and unnecessary words written, *e.g.* the name and designation of the public prosecutor, which is always the same. Is it economy? You would save more by omitting by authority of Her Majesty's Advocate, than by omitting 'falsely and fraudulently.'"



AGAIN Lord Rutherford Clark formed the minority, and certainly showed good cause for taking up that position. He, the prosecutor, had, as he pointed out, merely followed the form prescribed by the Act. "It is ludicrous to say that if he follows the form prescribed, there may, nevertheless, be no relevant indictment, and yet that will be the necessary result if this indictment is held irrelevant."

THE Lord Advocate in person argued in favour of the relevancy, but the majority of the Court would not accept the constructions put upon the statute by its own author.

* * *

UNDER the Public House Act of 1862 power is given to fine or imprison a witness who prevaricates, but the nature of the offence must be set forth in the sentence. In a recent case the High Court have held that the sentence must set forth the particulars as well as the nature. Lord Young again exhibited his strong dislike to anything approaching the exercise of arbitrary power on the part of a petty magistrate. "It is not a light matter to send a witness from the witness-box to jail on the impression of a bailie. It is a very serious interference with the liberty of the subject, and might destroy a man for life. It was not sending him to prison after trial, in which, having had due notice, he could have brought forward evidence in support of his position, but a summary conviction upon the impressions of a magistrate." *Soutar & Brown v. Stirling & Ferguson*, H. C., May 28, 1888.

* * *

THE case of *Renton v. Wilson*, H. C., June 1, 1888, illustrates the unsatisfactory condition of the law relating to cruelty to animals. It has settled the question, which has hitherto been variously decided, whether the process of horning cattle be cruel in the sense 13 & 14 Vict. c. 92. But it seems to recognise the principle that a cruel custom, provided it be a *custom*, may be practised with impunity. There is high authority for holding that the horning of cattle causes much pain. But (*per* Lord M'Laren) "here we have a custom prevailing over a large district, existing with a view to rational purposes, and as being thought necessary for the well-being of the animals themselves, and of other animals. In a case combining all these considerations the practice is not to be regarded as cruelty under the statute."

* * *

Earnings of Wives trading separately from Husbands.—The case of *Pope v. Bushell*, decided by the Court of Appeal on Wednesday, illustrates what may fairly be called the oddities of the present law of married women's property. In that case the husband was a barber, but held a licence for a public-house, which was managed by the wife. His interference in his wife's management of the house appears to have been limited to a free consumption of the stock, a habit which could never have conduced to success as a barber, and which appears to have brought him eventually to a lunatic asylum. As he was thus "by infirmity rendered incapable of keeping an inn" within the meaning of section 14 of the Licens-

ing Act, 1828, the licence was transferred to the wife. Meanwhile the wife had made a "stocking," which two years after the husband's lunacy amounted to more than £400, deposited with a friend. Four years afterwards she died, having made a will and appointed executors, and her husband survived her only a few months. Her savings were claimed by her executors, and by her husband's administrator; and at the trial of an interpleader issue, Mr. Justice Stephen decided in favour of the executors, apparently on the ground that, as the husband's administrator was plaintiff in the issue, he had not discharged the burden of proof that the money was his. If this view were tenable, it would cause a shyness in claimants making themselves plaintiffs to issues, and conflict with the rule that the decision on the issue is final against all the world. Lords Justices Lindley and Lopes gave no countenance to this doctrine, but considered that the money, being made at the public-house while the husband was licensed in respect of it, and while he was a lunatic, although earned and saved by the wife without his knowledge, was not earnings of "a wife in a trade carried on separately from her husband" within the meaning of the Married Women's Property Act, 1870, and therefore that the money went to the husband's family, and not under the wife's will. No objection can be made to the decision, which is in accordance with the law. The Married Women's Property Act, 1882, does not help so soon as the continuity of the earnings is established. Down to the time of the husband's lunacy the position of the married woman was the same as if she had been an agent, except that an agent would have a claim for remuneration; but if an agent's principal became lunatic, and the licence with possession of the house was transferred to the agent, his subsequent profits would be his own. They are, however, not a wife's when the business was her husband's. The only hope for the executors was that a distinction could be drawn in favour of the money earned after the licence was transferred to the wife. It might be argued that the adverb "separately" was satisfied by the walls of a lunatic asylum. The answer is, that the separation must not only be in fact but in legal relation; and the wife who carries on the business of her husband during his lunacy carries on his business and not her own, although the licence to trade may be in her name.—*Law Journal*.

* * *

Report of the Committee of the Faculty of Advocates on the Bail (Scotland) Bill, 1888.—The following report was approved of by the Faculty:—

The committee approve of this Bill. Its leading principle is to place the discretion of admitting or refusing liberation on bail in all cases, except murder and treason, in the hands of the magistrate who commits, subject to a right of appeal to the Court of Jus-

tiary on the part of the public prosecutor if bail is allowed, or on the part of the person accused if it is refused.

It also repeals the standard of bail with reference to the station of the person accused, and leaves the amount in all bailable crimes (*i.e.* all crimes except murder and treason) to the magistrate, subject to a similar right of appeal to the Court of Justiciary.

This alteration in the law was recommended in 1871 by the fifth report of the Law Courts (Scotland) Commission, and has been frequently urged since the date of that report.

The law as altered by this Bill will be substantially the same as that of England.

The Criminal Law Procedure (Scotland) Act of 1887 made, by its 18th section, application for liberation on bail competent before commitment, immediately after the accused had been brought before any magistrate for examination in all bailable crimes, and the same principle is now proposed to be extended to the case of applications for bail after commitment for trial.

The definition of bailable crimes is, however, enlarged by the present Bill, and will now include all crimes except murder and treason. It has been thought by some persons that the category of non-bailable crimes should be larger, and should or might include, for example, such crimes as piracy, sedition, and crimes under 10 George IV. cap. 38 (attempts to murder). But, on the whole, the committee think, as it is to be in the power of the magistrate to refuse bail in any case, and also in the power of the public prosecutor to appeal if bail is allowed, or what he deems an insufficient sum fixed, that it is sufficient to confine non-bailable cases to the two crimes mentioned in the Bill.

As the Bill has already been read a second time and referred to the Grand Committee on Law, some suggestions with reference to the details of the Bill, which appear to deserve the consideration of that committee, may be added.

Section 2, line 2, the expression "any magistrate having jurisdiction *where any crime or offence is committed*," is a somewhat indefinite description of the class of magistrates entitled to admit to bail. The meaning intended might perhaps be better expressed by substituting the words "to commit the offender with a view to trial," for the words "where any crime or offence is committed."

Section 2, at the close, it is suggested that there should be added the words, "and such application shall be disposed of within twenty-four hours after its presentment to the magistrate."

This is provided for by the Act 1701, cap. 6, and is not intended to be repealed. But it is thought that it would be expedient to include it in the present Bill, which would then form the leading and indeed only statute necessary to be consulted by magistrates with reference to bail, with the exception of the provision of section 18 of the Criminal Procedure Act of last year as to bail prior to commitment for trial.

Section 6, line 3. The insertion of the words "on finding the bail fixed" between the word "shall" and the words "be liberated," and the omission of the words "pending consideration of the appeal" in line 9, would, it is thought, improve the phraseology of this section. As the clause at present stands, if read literally the applicant to whom bail had been allowed by the magistrate would be entitled to liberation after the periods of 72 or 144 hours therein mentioned, even if the Court of Justiciary sustained the appeal of the public prosecutor against bail being granted or the amount of bail fixed, unless that Court had ordered further detention of the applicant "pending consideration of the appeal." Nor are the words "pending consideration of the appeal" free from ambiguity. It is thought that the power of the High Court to order further detention should not be subject to any limitation.

Section 7, line 2. After "Lord Advocate," insert the words "to consent to."

Admitting to bail is, according to the existing theory of the law, which is not in this respect proposed to be altered, the act of the magistrate or court, and the province of the Lord Advocate appears to be more correctly expressed by the word "consent."

Section 8. The words "public prosecutor" are defined as meaning any prosecutor acting "for the public interest in the High Court of Justiciary or the Sheriff Court." It is thought the word "or" should be deleted, and the words "Burgh or Justice of the Peace" inserted between the word "Sheriff" and the word "Court."

Bail after commitment is no doubt generally dealt with in the Sheriff Court or Court of Justiciary, but there are cases in which the application for liberation is made in the Burgh Court, or even in trifling cases in the Justice of Peace Court, and it is thought that the public prosecutor in these Courts is the proper contradictor in such cases, and should be included in the definition. The Bill itself contemplates that application for liberation on bail may be made not merely to the Sheriff or Sheriff-Substitute, but to any magistrate or justice of the peace.—Æ. J. G. MACKAY, *Convener*.

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IN *Dickson v. Linton*, H. C., June 1, 1888, Lords Young and McLaren were of opinion that, in order to warrant a conviction in the case of an unsound meat prosecution, it is sufficient to prove possession of the meat without personal knowledge of its unsoundness.

* *

Marriages by Sham Clergymen.—Recently we called attention to an important circular raising the question whether marriages celebrated by a "sham" clergyman—believed by the parties to be in holy orders—are valid. Our own opinion is clearly that they

are. The doubt arises from the decisions of the House of Lords in the well-known cases of *Reg. v. Millis* (10 Cl. & Fin. 534; 8 Jur. 717) and *Beamish v. Beamish* (5 L. T. Rep. N. S. 97; 9 H. of L. Cas. 274), where it was held in effect that, by the common law of England (and of course excepting marriage by the registrar, etc.), the presence of a priest, or, since the Reformation, of a deacon, was essential to marriage. It is important to notice that, in the case of *Reg. v. Millis*, the House was equally divided, Lords Brougham, Denman, and Campbell being in favour of the marriage, which was performed by a Presbyterian minister, and the decision being against its validity on account of the rule, *Semper presumitur pro negante*. This case was followed in *Beamish v. Beamish*, where it was also decided that a clergyman cannot perform the marriage ceremony for himself. But, notwithstanding these decisions, we say that the rule does not apply to a case where the parties *bona fide* believed that the person solemnizing the marriage was a clergyman. In *Reg. v. Millis*, Lord Campbell (10 Cl. & F. 784) touches on the subject, and says: "Mr. Pemberton admitted at the bar, as he was bound to do, that the marriage would be valid. Lord Stowell repeatedly expressed an opinion to this effect; and it turns out that in the instance of a *pseudo* parson, who about twenty years ago officiated as curate of St. Martin's-in-the-Fields, and during that time married many couples, upon the discovery of his being an impostor, which became a matter of great notoriety, no Act of Parliament passed to give validity to the marriages which he had solemnized, which could only have arisen from the Government of the day being convinced, after the best advice, that in themselves they were valid." Mr. Pemberton was the counsel who argued against the validity of the marriage. Lord Campbell goes on to say that the idea that parties so married should find that they were living in a state of concubinage, and that their children are bastards, "is a supposition so monstrous, that no one has ventured to lay down for law a doctrine which would lead to such consequences" (p. 785). The Lord Chancellor, who decided against the marriage in *Reg. v. Millis*, yet appears to have considered marriage by a sham clergyman valid (p. 860); and Lord Cottenham, who also held the marriage in *Reg. v. Millis* void, said: "It was urged that marriages were good when the person officiating was not in orders, though pretending and believed to be so. This I apprehend depends upon a very different principle. The Court in such a case would not, I conceive, permit the title to orders to be inquired into" (p. 906). It will be seen, then, that the above case of *Reg. v. Millis* does not cover the case of the sham clergyman, but rather expressly excludes it from its scope. And it is not in the least likely that the principle of *Reg. v. Millis* will be extended. The Supreme Court of Bombay refused to follow it in 1849 (*Maclean v. Cristall*, 7 Notes of Cases, App. p. 17). It should be remembered that by the

ancient canon law, which is the foundation of our English marriage law (*Proctor v. Proctor*, 2 Hag. Consist. 300), the presence of a priest was not essential to a valid marriage, which was indeed considered to be a sacrament without such intervention; and the principle laid down in *Reg. v. Millis* is contrary to many high authorities, and possibly founded on an erroneous view of English history. Of course, marriage by a pretended clergyman is not invalidated by 4 Geo. IV. c. 76, s. 22, as that only affects cases where the parties have "knowingly and wilfully" married contrary to the statute.—*Law Times*.



Counsel's Authority from Client.—Though counsel and solicitor are both agents of the client, they differ in many important particulars, the chief characteristic of the agency of the counsel being, that it is based on the theory that he acts gratuitously, and is not responsible for what in other cases would be called negligence in conducting his business. There are other collateral consequences of that doctrine. The doctrine has often been considered unintelligible to the lay mind, but it has been steadily adhered to and maintained by the Courts as the best mode of enabling clients to be efficiently protected while fighting out their multifarious quarrels. It is needless to moralize over the various good and weak points connected with this settled practice, but from the occasional litigations reported it is obvious that there are still difficulties not easily solved. The whole subject, indeed, has been well explored and discussed during the last thirty years in one or two remarkable cases. And some of these require to be kept well in view, owing to the frequent tendency of exasperated clients to console themselves with an action against their supposed betrayers. And we rather think there have been, almost continuously, examples of such actions against counsel again and again begun in the Courts, though these are usually nipped in the bud by a timely application for a summary dismissal of the action.

The leading case of *Swinfen v. Lord Chelmsford*, 5 H. & N. 890, brought out most of the learning relating to the liability of counsel to clients. That was a case in which the plaintiff, the widow of a gentleman of property, was engaged in a controversy with the husband's heir-at-law. She retained the defendant, then at the bar, as her leading counsel. There was nothing unusual in the mode of instructing her counsel, and no special restrictions were put on his powers or as regarded any compromise. He was informed in his brief that the heir-at-law had made such an offer, which had been declined. When the trial came on, the plaintiff, on noticing the first day's proceedings, was inclined to reopen negotiations, but finally decided not to do so. On the second day something occurred which made both the plaintiff's attorney

and the defendant think a compromise expedient, and after a lengthened interview the defendant agreed to a certain compromise. The plaintiff, who had been absent, when informed, neither agreed nor disagreed, but when the heir-at-law sought to enforce the compromise, she resisted successfully any specific performance of the agreement, and a new trial having been ordered, she entirely succeeded on that second trial. She then sued the defendant to recover damages for the delay and heavy loss she sustained by her litigation, and she alleged and attempted to prove that the defendant had entered into the compromise in order the more quickly to dispose of the case for the purpose of his own convenience. The judge left it to the jury to say whether the defendant entered into the compromise *bona fide*, believing that he had authority. The jury found for the defendant, and afterwards a new trial was moved for, and much discussion took place as to the nature of the counsel's duty and liability in the circumstances. The judgment of the Court was reserved, and, when delivered, dealt fully with the arguments advanced against the counsel's authority.

The Court of Exchequer was unanimously of opinion that counsel, by accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express or implied. When he conducts the cause at the trial, the conduct and control are left to him necessarily. If a party desires to retain the power of directing counsel how the suit shall be conducted, he must agree with some counsel willing to bind himself. A counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may ultimately turn out to be quite erroneous. Although, however, counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing a juror, or calling a witness, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, in an action for a nuisance between adjoining lands, however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, the counsel have no authority to agree to such a sale so as to bind the parties to the suit without their consent, and certainly not contrary to their instructions. Such an agreement would be void. In that case, therefore, the new trial was refused, and the Court sustained the verdict which had been given by the jury in favour of the defendant.

Though the general rule may be tolerably clear as to the counsel not being liable for an honest mistake in conducting a suit, still a vagueness surrounds the further point, namely, how

far the authority extends, and what things are to be considered collateral to his main authority. In the case of *Prestwick v. Poley*, 18 C. B. N. S. 806, an action had been brought to recover the price of a piano sold by the plaintiff to the defendant. The two solicitors met and discussed the subject, and ultimately agreed that the action should be arranged on the terms that the piano was to be given up in full discharge of the debt, and that the costs should be paid by the defendant by instalments. Afterwards, the plaintiff would not agree to those terms, and an application was made to the Court to stay all further proceedings, on the ground that the action had been settled. It was contended that the solicitor of the plaintiff had no such authority as he professed to have. The Court, however, held that such a compromise was within the solicitor's authority. If the action had been successful, the plaintiff might have had execution, and the sheriff might have taken this very piano or other goods, and the solicitor, as it were by anticipation, took it.

The Court thought it would be most unfortunate for clients if attorneys could not compromise in this way.

In another case of *Strauss v. Francis*, L. R. 1 Q. B. 379, the very point suggested in some previous cases came to be decided, namely, whether counsel's authority to compromise would be supported, even though expressly dissented from by the client. The plaintiff had brought an action against the proprietor of the *Athenæum* newspaper for libel in condemning a novel which the plaintiff had published, "for its inanity, self-complacency, vulgarity, profanity, and indelicacy," etc. The trial took place before Erle, C.J., and Serjeant Ballantyne was the plaintiff's counsel. After the defendant's counsel had read various paragraphs, which were said fully to justify the criticism, the plaintiff's counsel interposed, and a juror was withdrawn by consent, of which course the Chief Justice expressed his approval. It turned out that the solicitor did not sanction the withdrawal of a juror, and told his counsel at the time that the client would not consent to this. Nevertheless, counsel acted on his own judgment, and withdrew a juror. A new trial was afterwards moved for, and it was contended that in the face of the client's expressed dissent, counsel had no authority to compromise the action as he had done. The Court would not accept this view, at the same time observing that the plaintiff had not made out that there was any express dissent on the part of the client to the withdrawal of a juror. Blackburn, J., said that the withdrawal of a juror was binding; but he was of opinion that counsel cannot compel a client to enter into a compromise by consenting to the withdrawal of a juror against his will. If the counsel cannot induce his client to act on his advice in such a case, the proper course is to return his brief. It was not necessary to decide that, if the client's dissent were known to the other side, such a compromise would be binding. All that was necessary

here to be decided was, that when a counsel, acting within his apparent authority, consents to withdraw a juror, the other side, acting fairly, may safely rely on the compromise being binding; and that in order to invalidate the arrangement, not only must it be shown that the counsel's authority was limited, but that the limitation was known to the other side at the time. Accordingly the Court refused to disturb what counsel had done.

In the recent case of *Matthews v. Munster*, ante, p. 260, the question again arose whether counsel had an authority in the circumstances to compromise. The plaintiff had brought an action for malicious prosecution, and the trial began on Saturday and was adjourned to Monday. The defendant and his solicitor, who were then on their way on Monday morning from Brighton to the Court in London, telegraphed to their counsel that they would reach London at 11 o'clock, but before they arrived, their counsel, acting on a suggestion made by the judge, consented to a verdict passing for the plaintiff for £350 and costs, and agreed that all imputations should be withdrawn against the plaintiff. The defendant, on being informed of this, afterwards applied for a new trial, on the ground that he had never given any authority, nor had he been asked to consent to any terms of settlement, for that the solicitor at the time had begged counsel to wait until the defendant arrived in Court. The new trial was refused by a Divisional Court, and then there was an appeal. The Court of Appeal added considerably to our definite knowledge as to the proper course in this class of disputes. Lord Esher, M.R., said that the duty of counsel was to advise his client out of Court and to act for him in Court, and until his authority was withdrawn he had, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client. It was true that this power could be controlled by the Court. If, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the Court had authority to overrule the action of the advocate. The relation of an advocate to his client could be put an end to at any moment, but the withdrawing of the authority must be made known to the other side, and this showed that the client cannot give directions to his counsel to limit his authority over the conduct of the cause and oblige him to carry them out. All he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so. If the client is in Court, and desires that the case should go on, and counsel refuses, and then the client does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed. Bowen, L.J., said that counsel ought to consult his client, if present, on such a matter as a compromise, but if the client is not present, the latter cannot

complain if the counsel compromise the suit within the reasonable limits of his authority to compromise.

Notwithstanding the decisions referred to, it must often become a question of dispute how far the authority of an advocate or solicitor extends, and whether his authority expires at a given stage of the litigation. A recent example of this is seen in *James v. Ricknell*, 20 Q. B. D. 164, where the plaintiff had employed a solicitor to bring an action to recover a debt. The action was brought and judgment was recovered and execution levied. Certain household furniture had been seized by the sheriff, but it was claimed under a bill of sale. An interpleader issue was directed, and a master at chambers decided in favour of the claimant, and made an order that the sheriff should withdraw, and that the execution creditor should pay the costs of the claimant, and the sheriff's costs and possession money. These costs amounted to £22, and the plaintiff's solicitor paid these to the claimant's solicitor, and then sought to recover them from his client. It turned out that the client had given no instructions to his solicitor to engage in interpleader proceedings. The Court held that the solicitor ought not to have engaged in these proceedings without consulting his client, for that the interpleading was a new issue, and a second litigation, which was not covered by the original retainer. Hence the client was not liable.—*Justice of the Peace*.

INTERVIEWS WITH CLIENTS.

BY A WORLDLY SOLICITOR.

LOANS TO INFANTS.

W. S.—Now, Quiller, I can see Mr. Savile Cork; ask him to step in.

W. S.—Good morning, Mr. Savile Cork; good morning; and how are you—fairly well? Come, that's capital.

Mr. S. C.—You duly received my letters?

W. S.—I did, my dear sir, I did; and very pleased I was that you took the precaution to write, for I had another appointment, which I managed to postpone.

Mr. S. C.—My object, sir, in calling is to seek your invaluable opinion again. I will, as shortly as possible, detail to you the matter which now troubles me. You have heard of, or are possibly acquainted with, Lord Plunger?

W. S.—Well, yes, I have had some little legal transactions with his lordship.

Mr. S. C.—Well, sir, I have had the misfortune to lend that young nobleman £500—

W. S.—Dear me! dear me! Surely, Mr. Savile Cork, you know that his lordship is under age?

Mr. S. C.—That fact I was well cognisant of. Also was I well aware that money lent to a minor cannot be recovered at law, unless lent for the purpose of buying clothes and similar articles, which you gentlemen of the legal profession call “necessaries.”

W. S.—And pray, sir, may I inquire who told you that money lent for the purchase of necessaries can be recovered?

Mr. S. C.—You yourself, Mr. Worldly Solicitor. Doubtless your retentive memory will call to mind that matter of young Masham’s in which you kindly gave me the assistance—

W. S.—Tut! tut! sir. Pardon me, but you yourself supplied him with the clothes—

Mr. S. C.—Certainly; he ordered from me suits, coats, and sundry other articles in my line of business.

W. S.—Quite so. You supplied him with articles, and the jury, fortunately for us, decided that the coats and other articles were “necessaries;” but this present affair is quite different. Let me state it plainly to you. The law allows a man to sue a minor for necessaries, that is to say, things needful to him in that station of life in which he moves. What are and what are not necessaries is a question for the jury to decide in each case; but here is altogether a different affair. You have lent young Lord Plunger £500. How do you know it has been expended on necessaries?

Mr. S. C.—I had his lordship’s word that he required that sum for hosiery and boots—

W. S.—What? £500 to buy hosiery and boots?

Mr. S. C.—Well, well, perhaps not. But what has all this to do with me? If I supply him with coats I can sue for my bill; if I supply him with money to buy other articles in which I do not deal, then you ask me if I know whether it has been expended in buying those things. The law, sir, cannot be such an unmitigated ass—excuse the expression—as to expect me to follow young Plunger about until he has purchased his ties and boots.

W. S.—But why not? One of our old judges stated that he for one never intended to allow money lent for the purpose of buying necessaries to be recovered; for he shrewdly opined “that the money might be spent in the nearest alehouse.”

Mr. S. C.—Then am I to understand that you are gradually preparing my mind for the information that I cannot recover this loan?

W. S.—That depends, Mr. Savile Cork. Now, if you will patiently hear me out, I will endeavour to explain the matter to you. A few months ago had you come to me with this affair I could have given you no advice at all; the point whether money lent for the purchase of necessaries could be recovered had never

been decided by the Courts. Recently—quite recently—within the last week or so, the question has cropped up: stay [*rings*]. Quiller, ask Mr. Tom to step this way—my young nephew, beginning to take an interest in his profession—Ah! Tom—Mr. Savile Cork, my nephew—can you tell me the name of that case about money lent for necessities?—*Lewis v. Alleyne*—Ah! yes, thank you, that will do.—Well, Mr. Cork, this very question cropped up, and after puzzling Mr. Justice Smith, next puzzled the Divisional Court—a kind of minor Court of Appeal—and has now been decided by the Court of Appeal. The rule laid down is this: that when money is *bona fide* lent for purchase of necessities the Court will order an inquiry to be held as to the expenditure of the money, and if it can be shown that the money was really spent on necessities, then it may be recovered, otherwise it is a contract within the Infants' Relief Act of 1874, and cannot be sued for. Now, Mr. Savile Cork, before you instruct me to issue a writ against his lordship for £500, consider—consider carefully—did his lordship expend that £500 on neckties and patent leather boots?

Mr. S. C.—But this is monstrous, simply monstrous! Am I to be defrauded out of my money? Must I follow the young rascal about to see how he spends the money? Heavens! . . .

W. S.—What sights you would see, and what compromising situations you would be placed in!

Mr. S. C.—But this is most alarming information! I have thousands and thousands—

W. S.—What! lent out in a similar way?

Mr. S. C.—Yes, yes; how can I save myself?

W. S.—Persuade the young gentlemen that they all want new coats and trousers, then you can gradually reduce the *loan* for the purchase of necessities, and sue for the cost of necessities.

Mr. S. C.—Excellent idea! I'll easily manage that.

W. S.—But stay, the law interferes slightly. Don't overdo it. For it has been decided—I told you this once before when you came to me for advice—that if a minor is already amply supplied with trousers, etc., a further supply will not be deemed necessities: there has been another decision on this point—*Johnston v. Marks*—since I told you of the previous case, *Barnes v. Toye*.

Mr. S. C.—Yes, yes, I remember. But to return to his lordship's case. Must I, to recover that £500, be prepared to prove, if an inquiry is ordered, that the money went in necessities?

W. S.—Certainly. Such is the effect of this recent case, *Lewis v. Alleyne*; money lent for necessities may be sued for if it can be shown that it was expended in necessities, and to ascertain this the Court will order an inquiry.

Mr. S. C.—And is there absolutely no way—no quibble even that occurs to your mind—whereby I may recover this money?

W. S.—None. My advice is, wait till his lordship comes into his property and throw yourself on his mercy, unless you are pre-

pared to show that the money was spent on necessities. Take time to think it over.

Mr. S. C.—Well, I will. I'll think over it. Good day, Mr. Worldly Solicitor. Good day.

W. S.—Good morning, sir. Ah! here's your umbrella.

W. S. (soliloquizes).—Now that old rascal knows well enough that £500 never went in necessities. Ah, Quiller, what is it?—Mr. Savile Cork wants to say one word.—Certainly, certainly.

Mr. S. C. (re-entering).—I've made up my mind. Don't bring an action. That £500 never went in neckties and boots. Good-bye, good-bye.

W. S. (further soliloquizes).—No, my money-lending old friend, nor on gloves, except, perhaps, ladies' gloves. Will ask Tom if ladies' gloves are necessities.—*Law Notes.*

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ORKNEY.

Sheriff ARMOUR.

HARVEY v. M'ADIE.

Bankruptcy—Cessio—Equalizing of diligencies—Section 12 of Bankruptcy Act of 1856.—A creditor arrested a boat belonging to his debtor in execution of a decree. Next day the debtor applied for cessio. On the arresting creditor applying for warrant to sell the boat, decrees were produced by other creditors: *Held*, that although the arrestment could not be cut down by decree of cessio, those creditors having liquid grounds of debt, or decrees obtained within sixty days before or four months after the constitution of notour bankruptcy, were entitled under the 12th section of the Bankruptcy (Scotland) Act to be ranked *pari passu* with the arrester. The arrester found entitled to his expenses preferably out of the proceeds of the sale.

This was a petition for warrant to sell a boat arrested in execution of a decree. The circumstances appear from the interlocutor and note of the Sheriff-Substitute (Armour).

"*Kirkwall, 10th May 1888.*—The Sheriff-Substitute having heard parties' procurators and made avizandum, for the reasons stated in the appended note, Appoints the creditors of the defender, George M'Adie, who have 'liquid grounds of debt or decrees of payment,' within the meaning of section 12 of the Bankruptcy (Scotland) Act, 1856, to lodge the same within eight days from the date of this interlocutor: Further, appoints Thomas Smith Pearce, Accountant, Kirkwall, as trustee under the petition for cessio at the instance of the said George M'Adie, to

sell the boat mentioned in the prayer of this petition, and to rank the pursuer and such other creditors of the defender as may produce in this process liquid grounds of debt or decrees of payment as aforesaid *pari passu* on the price realized: *Quoad ultra*, refuses the prayer of the petition, but allows the pursuer the expenses of this process and of the arrestment of said boat, as the same shall be taxed, and appoints the trustee to rank him *primo loco* on the price realized for said expenses.

"*Note*.—Though the sum in dispute here is small, the question raised is of some importance. On 30th March 1888 the pursuer arrested a boat belonging to the defender in execution of a small debt decree. Next day the defender presented a petition for cessio. On 5th April the pursuer applied for warrant to sell the boat, and this application was opposed. Had the pursuer alone done diligence against the estate, and had there been no creditors having 'liquid grounds of debt or decrees of payment,' it appears to me he would have been entitled to the warrant asked, for it is apparently settled that a decree of cessio does not cut down diligences in the same way as a sequestration (Goudy, p. 451, Mackenzie's *Manual of the Law of Cessio*, p. 38, and cases there quoted). Moreover, the decree of cessio, even when pronounced, has no retroactive effect (*Reid, Johnston, & Scrimgeour v. Carr's Trustees*, 1885, 1 Sheriff Court Reporter, 366); and when the parties were heard in this case, nothing had been done in the cessio process except to obtain the usual warrant of citation (a trustee was appointed a few days after), so that it was uncertain whether the estate would eventually be wound up by that process or not.

"But at the hearing certain decrees were exhibited, obtained by other creditors of the defender against him within sixty days, and section 12 of the Bankruptcy (Scotland) Act, 1856, provides that 'arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy . . . shall be ranked *pari passu* as if they had all been used of the same date; . . . provided, further, that any creditor *judicially producing*, in a process *relative to the subject of such arrestment or poinding*, liquid grounds of debt or decree of payment *within such period*, shall be entitled to rank as if he had executed an arrestment or a poinding.' The decrees have not yet been judicially produced in this process, and an opportunity for doing so is therefore given. When this is done the holders of them will be entitled to rank *pari passu* with the pursuer. If this be so, it is obviously for the advantage of all concerned, and will be much less expensive, if the boat be sold by the trustee who has now been appointed,—indeed, this was practically admitted at the bar.

"Expenses are allowed to the pursuer, because, apart from the provisions of the section of the Bankruptcy Act of 1856 quoted, his diligence has secured a preference to the other creditors ranking along with him in this process; further, he was availing himself only of his legal rights, and, until the hearing, cannot be supposed to have known whether any creditors held either 'liquid grounds of debt' or 'decrees of payment.'"

Notes of English, American, and Colonial Cases.

SHIP.—*Charter-party—Customary manner of loading—Construction of charter-party with reference to port of loading—Detention—Demurrage.*—By a charter-party the ship was to proceed to Bilbao, and there load in the customary manner in regular steamer turn, where and as ordered by the agent of the freighter, a cargo of iron ore; four hundred tons per working day, weather permitting, to be allowed for loading, and all demurrage over and above the said days at the rate of 12s. 6d. per hour, no demurrage to be paid in case of any hands striking work, frosts, or floods, which might hinder the loading of the vessel. The port of Bilbao was on a river where there were a number of wharves, and the iron ore was brought down to the wharves by railways from storing places five miles off, and loaded direct from the railway trucks into the ship by means of shoots, there being no storing places at the wharves. Ships, however, were sometimes loaded while lying out in the river from barges which brought the ore from storing places higher up the river. The ship was ordered to San Nicholas wharf to load, and she was there loaded under a shoot with ore brought down by rail as above-mentioned. In consequence of heavy rains at the storing places, and in consequence of the men who were loading the ore into the railway trucks there refusing to work from fear of the cholera, delay occurred and the ship was detained waiting for her cargo:—*Held*, without deciding whether the refusal of the men to work came within the exception in the demurrage clause of “hands striking work,” that neither the state of the weather nor the refusal of the men to work hindered the “loading,” inasmuch as both those causes of delay operated before the ore arrived at the place of loading, and the nature of the port was not such that the only possible mode of loading the ship was by bringing the ore by railway from the storing places five miles off, so as to bring the case within the decision in *Hudson v. Ede* (36 L. J. Rep. Q. B. 273; 37 L. J. Rep. Q. B. (Exch. Ch.) 166. *Stephens v. Harris & Co.* (App.), 47 L. J. Rep. Q. B. D. 203.

WILL.—*Construction—Gift to children—Illegitimate children—“Representatives.”*—The testator gave his residue to trustees, upon trust, as to one-third part thereof, to pay the income to his brother W. during his life, and after his death to divide the same amongst all his children who should be living at the time of his decease, and the “representatives” of such of them as might have died in his lifetime who should have attained the age of twenty-one, equally, share and share alike, but so nevertheless that the representative or representatives of such of them so dying should take only the share to which the deceased child would have been entitled had he or she survived the said W.; and the testator directed that the trustees should stand possessed of one other third part upon the like trusts for the benefit of his sister C., “the wife of T. H., and her child or children,” as were thereinbefore expressed concerning his said brother W. and his child or children. C. was never married to T. H., who had a lawful wife, from whom he was separated, and who survived him, but C. cohabited with him down to the day of her death, and had children by him. At the date of the

will C. had had no child for eighteen years, and was presumably past child-bearing. The testator was well aware of all these facts, and frequently visited C. and T. H., and always treated the children of C. as his nephews and nieces:—*Held*, that inasmuch as the testator had described C. as the wife of T. H., knowing that she was not and could not be his wife, and had correlatively used the word "children" in speaking of the offspring of C. and T. H., he must be taken to have attached to the words a meaning different from their strict legal sense, and therefore that the illegitimate children of C. were entitled to take. *Held also*, that "representatives" must be construed not as "legal personal representatives," but as "next-of-kin" or "descendants." *In re Horner*; *Eagleton v. Horner*, 47 L. J. Rep. Ch. 211.

There is nothing in *Dorin v. Dorin* (L. Rep. 7 E. & I. App. 568, 573) to show that the House of Lords in that case dissented from anything that was laid down in *Hill v. Crook* (42 L. J. Rep. Ch. 702, 714; L. Rep. 6 E. & I. App. 265, 282).—*Ibid.*

In re Ayles's Trusts (45 L. J. Rep. Ch. 223; L. Rep. 1 Ch. D. 202) and *Ellis v. Houston* (L. Rep. 10 Ch. D. 236) considered.—*Ibid.*

PARLIAMENT.—*Franchise*—*Freeman*—*Registration*—*Residence*—2 and 3 Will. IV. c. 45, s. 32.—R., a single man, resided in his father's house in Exeter, with exclusive use of a separate bedroom. During the six months previous to the 15th of July he twice went up to London, and each time obtained employment as an indoor draper's assistant. On the first occasion he remained away two months, and then returned to his father's house as before; on the second occasion he remained away altogether. His employment required his continued presence in London, nor could he have returned to Exeter during such period except from Saturday to Monday:—*Held*, that R. had not "resided" within the necessary limits of the city of Exeter as prescribed by 2 and 3 Will. IV. c. 45, s. 32, and was not entitled to be on the list of free-men for the city. *Beal v. Town Clerk of Exeter*, 47 L. J. Rep. Q. B. D. 128.

PARLIAMENT.—*Registration*—*Occupation franchise*—*Militiaman*—*Compulsory absence on duty*—*Army Act*, 1881, ss. 15 and 176.—A non-commissioned officer on the staff of a militia regiment resided with his family in a house within a borough. During the annual training of the regiment he was absent from the borough twenty-six days of the qualifying year, but while so absent his house continued to be occupied by his wife, family, and furniture. With the leave of his superior officer he returned at intervals during the annual training to his house in the borough, and could have returned there every night had the distance been less, as his duties did not require his attendance:—*Held*, following *Ford v. Barnes* (55 L. J. Rep. Q. B. 24; L. Rep. 16 Q. B. D. 254), and *Spittal v. Brook* (55 L. J. Rep. Q. B. 48; L. Rep. 18 Q. B. D. 426), that occupation, under the circumstances, was broken. *Donoghue v. Brook*, 47 L. J. Rep. Q. B. D. 122.

THE JOURNAL OF JURISPRUDENCE.

THE AMERICAN COPYRIGHT BILL.

FOR some considerable time persevering efforts have been made with the view of bringing about an International Copyright between this country and the United States of America. There are now some fifty millions of English speaking people in the great republic, and the leading British writers are accordingly read at least as widely on the other side of the Atlantic as they are on this. The moment that a new book appears in this country from the pen of a well-known author, or the work of a previously unknown one has made a name for itself, it is at once reprinted in New York or Boston, and sold by the thousand throughout the States. This circumstance may indeed be gratifying to authors from the view-point of fame and glory, but it is notorious that few of them have been enriched to the extent of a single sixpence by their popularity in America. Literature, moreover, it must be remembered, is rather a trade, whereby men earn or attempt to earn their daily bread, than a pursuit followed by those who are possessed of wealth or leisure, and of ideas which they wish to communicate to their fellow-men. And it is but natural that the literary artisan should resent the systematic appropriation of his work by American publishers, and desire that a state of things in which that is possible should be speedily brought to a close.

The grievance, too, is not diminished by the fact that it does not fall with equal weight on American authors who become known on this side. Such American authors, indeed, are somehow very few and far between, and then, as will be explained more fully hereafter, by the very simple device of simultaneous publication here and in America, the American author can secure a British copyright as well as whatever privileges he may be entitled to under the laws of his own country. For long nothing came of the efforts that were made to secure for popular British authors more equitable treatment. Then a Commission to inquire into the whole matter was appointed, and, finally, a Bill has been introduced into

the Senate with this object ostensibly in view. That Bill has passed the Senate by a majority of 35 votes to 10, and is almost certain to obtain the concurrence of the House of Representatives, if not this session, at all events within a measurable distance of time. Various causes have contributed to this result besides a desire to deal justly by British authors. In particular, the great publishing houses who used to thrive on the reproduction of British works had a sort of understanding among themselves, whereby they refrained from bringing out unnecessary reprints, and from all serious competition in that direction. But of late other publishers have come to the front who will consent to be bound by no such arrangement, and who, by multiplying reprints and lowering prices, have seriously curtailed the profits which the big firms of New York and Boston used to enjoy. These big firms are consequently now in favour of an arrangement which will enable them to secure the monopoly in America of popular British books. American authors are also in favour of the change. They have all along advocated fair play for their fellow-authors. And they also know that the rise in the price of books of British origin, which any change must bring in its train, will in the long run be of advantage also to them. It is, however, otherwise with the great mass of the population. So far as they are concerned, the first and only necessary result will be, their being no longer able to purchase British reprints at the present low price. But this is the only objection which the ordinary citizen can entertain to the proposal, and his sense of decency and fair play will prevent his urging it with any very great strength. The printing trade in all its varieties and branches is, however, bound to be affected, and that injuriously, by the proposed copyright. The increase in the price of British reprints, which the institution of a copyright must certainly entail, will necessarily result in a considerable reduction in the quantity sold, and that of course means a considerable shrinkage of the industry. The opposition of the American labour vote had accordingly to be discounted, and, if possible, averted by the promoters of the Copyright Bill. And with typical Yankee 'cuteness, they have succeeded in inserting in the Bill a few words which has not merely averted from their measure the bitter and determined opposition of the labour vote, but actually secured its earnest and hearty support.

By the law of the United States as it stands at present, copyright is granted only to such authors as may be citizens of the United States, or resident therein. Foreigners not resident within the United States have no way of securing protection open to them. They are entirely at the mercy of literary pirates. The Bill which has passed the Senate confers for the first time protection upon authors who do not fall within the favoured category of those who are citizens of the United States, or resident therein. But it does not establish International Copyright, and the protection it

confers is conferred only on certain conditions, and it is by means of one of these conditions that the hostility of the printing and other industries has been so effectually disarmed. Copyright is to be acquired by no person who shall not *inter alia*, not later than the day of publication within the United States or elsewhere, deliver at the office of the Librarian of Congress at Washington, District of Columbia, or deposit in the Mail within the United States, addressed to the Librarian of Congress at Washington, District of Columbia, two copies of the book he desires to copyright, *printed from type set within the limits of the United States.*

To these last words special attention must be directed. They have disarmed the opposition of the American printing trade and awakened the alarm of the printing trade of this country, and they will in all probability lead to diplomatic representations to the Government of the United States, and to changes in our own copyright laws. Every author, British or American, who wishes to copyright a book in the United States will, if the new Bill becomes law, have to lodge with the Librarian to Congress, not later than the day of publication, wherever such publication may take place, two copies of his work *printed from type set up in the States.* No British author can at present obtain that privilege on any terms; and all who expect that their books will have a large sale in the States will be glad to obtain it even on the terms stated. In other words, all the leading British writers, and many others who think that they ought to be and are likely to become leading, will for the sake of the American copyright have their books set up there. And when a book has been set up in America, it would be sheer waste to have it set up over again in this country. Either the whole edition will be printed in New York or Boston, and a sufficient number of copies to supply the British market will be shipped in sheets to be bound over here, or stereo plates will be struck in America, and sent over here to print the British edition. It is very clear that either way a very serious blow will be dealt to our printing industry and to all the other industries which depend upon it. How much of our printing will be in this way decoyed over to America it is difficult to say exactly. But it is certain that quite enough will go to materially and permanently damage our printers, typefounders, lithographers, and in short all who are in any way connected with the industry which is assailed.

It must be borne in mind who are to profit by the change in the American law which will bring about all this mischief. To some extent the American printing trade and subsidiary industries will gain. They will indeed not gain so much as they fancy, because the present practice of producing unauthorized reprints will be put a stop to, and the higher prices that will be charged for the copyrighted publications will to some extent operate as a check on the sale of these. Still, upon the whole, there will be a considerable

balance of gain to these industries. Then the publishers will also profit—though here, also, there must be taken as a set off the loss they will experience by the termination of their piratical operations. The gain, too, will fall chiefly to the larger publishing firms who can afford to have agents in this country to negotiate with our authors, and will fall even to them only on the assumption that existing British firms do not set up branch establishments in the United States. That this will be done is more than probable, unless the boasted enterprise of British publishers has become a thing of the past. What may be anticipated is just this. British publishers will arrange with British authors very much as at present; but instead of having their printing done in London or Edinburgh, they will have it done in Boston or New York, and to a large extent, instead of using paper made in this country, they will use American paper, even for the editions which are published and sold here. The total gain to the American publishers will thus be much smaller than might have been expected. They will lose the profits they are at present making, and will not be much more than recouped for their loss by the gains that will fall to their share under the new arrangement. The authors, however, remain to be considered, and when our analysis is turned in this direction, it will be apparent where the lion's share of the spoil is sure to go. A popular author in this country can at present make excellent terms with his publisher. He will be able to make still better terms when the publisher can obtain an American as well as a British copyright. The cost of producing a book is, through the higher wages that have to be paid, greater in the United States than it is here. But even when this is allowed for, the American copyright of a popular book, which will be secured by production in the United States, will be a valuable property, and will have to be paid for by the publisher as such. Just as publishers make publishing pay in this country at present, after paying the author for the copyright, so they will make it pay in America after purchasing the copyright there. The distribution of profit between author and publisher will be in no way affected by the new arrangement. But the author will have something additional to sell, and for that he will, of course, obtain an additional price.

It is thus the British author, in whose interest International Copyright has so long been sought, that will chiefly profit by this new arrangement. The other people who fancy that they also will profit thereby, and who have backed up the demand of the authors from purely selfish motives rather than any regard to justice, will find their hopes falsified by the event. There is, of course, no wish in this country that our authors should not at length receive in the United States that fair play which they receive in nearly every other civilised country, and which American authors can, even as things now stand, secure for themselves among us. But it is a question whether fair play for our

leading authors, who alone are likely in any way to benefit by obtaining an American copyright, cannot be purchased too dearly. And there are very good grounds for holding it is being purchased too dearly in the present case.

Copyright in this country is wholly a creature of statute. It was long disputed whether there was a common law copyright or not. But so far as books are concerned, copyright is regulated entirely by the Act 5 & 6 Vict. cap. 45, which repeals all the previous Acts on the same subject. The copyright given by this Act extends for the lifetime of the author, and a further period of seven years; or if the said seven years expires before the end of forty-two years from the date of the first publication of the book, then for forty-two years from such first publication. By the previous Act of Queen Anne (8 Anne, c. 19), it was all along admitted, foreigners could acquire copyright, provided they were resident within the British dominions at the time of the first publication. It was, however, for long unsettled whether such residence was necessary, and conflicting decisions were pronounced. In the well-known case of *Jeffreys v. Boosey* (4 H. L. Ca. 815), it was decided that such residence was necessary, the rubric indeed stating that the object of the Act was to encourage literature among British subjects, which description includes such foreigners as by *residence* here owe the Crown a temporary allegiance, and that any such foreigner first publishing his work here is an "author" within the meaning of the statute, no matter where his work was composed, or whether he came here solely with a view to its publication; but that if at the time of publication the foreigner is not in this country, he is not a person whom the statute intended to protect. The residence which alone is required under even this early Act is infinitely less than the residence, amounting almost to permanent sojourn, which is taken as the alternative to citizenship by the law of the United States. And in a subsequent case grave doubts have been expressed whether even this residence was really contemplated by the Act, and accordingly whether *Jeffreys v. Boosey* was correctly decided. But this is now a matter of no moment, for as laid down in *Roulledge v. Low & Others* (L. R. 3 H. L. 100), the word "author" is used in the Statute 5 & 6 Vict. c. 45 without limitation or restriction, and is therefore equally applicable to foreigners as to British subjects, and it is not probable that the opinion—though not necessary for the decision of the case—which was expressed most strongly by Lords Cairns and Westbury, that the protection of the statute is given to every author who first publishes in the United Kingdom, wherever he may then be resident, and to whatsoever country he may belong, would ever have been disregarded in a later case even had the second section of the Naturalization Act of 1870 (33 Vict. c. 14) not taken away all room for doubt. By the International Copyright Acts there are also provided means for extending protection in

this country to works—either of British or foreign authors—which have been first published abroad. This was first attempted by the Act 1 & 2 Vict. c. 59, but it proved insufficient for its purpose, and was accordingly repealed by the Act 7 & 8 Vict. c. 12, which, as explained by the Act 15 & 16 Vict. c. 12, now contains the law on the subject. By the second section of the Act of 1844, it is enacted that Her Majesty by order in Council may direct that authors, etc., of works first published in foreign countries, shall have copyright therein within Her Majesty's dominions. And section 3 provides that if such order applies to books, the copyright law as to books first published in this country shall, with certain exceptions, apply to the books to which the order relates. But section 14 goes on to declare that no such order in Council shall have any effect unless it shall be therein stated as the ground upon which it has been issued, that due protection has been secured by the foreign power named in such order for the benefit of parties interested in works first published in the dominions of Her Majesty. In other words, reciprocity is the basis of our International Copyright.

Our copyright legislation thus takes no note of whether the author be a British subject or not, of where the book has been written, or of where it has been printed. If the first publication be in this country, then the book is protected. If the first publication has taken place abroad, then the book is not protected, unless such an order in Council has been issued with reference to the country where the publication has taken place. It is, of course, obvious that no such order can be issued with reference to the United States, which, as has already been pointed out, grants copyright to no one but "citizens" or "residents," even in the case of works which are first published in New York. But by the ingenious device of arranging for the first publication taking place both in this country and in their own, American authors have been in the habit of securing a copyright on both sides of the Atlantic.

Although the benefits conferred upon authors by the Copyright Acts are indeed immense, it must be noted that it is not from a regard to the interests of authors that these Acts owe their existence. The preamble to the Act of Queen Anne declares its object to be "the encouragement of learned men to compose and write useful books." And commenting upon this Act, Lord Chancellor Cranworth observed,—“That where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object.” Lord St. Leonards illustrated this view by pointing out another instance of exactly the same policy about the very same time in an Act of 7th Anne, for encouraging the settlement here of foreign Protestants. With regard to the object

of the present Copyright Act, very plain language is used by Lord Chancellor Cairns in the case of *Routledge*. It is, in his own words, "to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. This benefit is obtained in the opinion of the Legislature by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author, but it is a benefit given not for the sake of the author of the work, but for the sake of those to whom the work is communicated."

There is thus no room for doubt that the interest of authors is regarded even by the Copyright Acts as something quite subordinate to the general interest of the community as a whole. And, accordingly, if it be found that the privileges conferred on authors do not promote the end they were intended to serve, or that their continuance has become unnecessary, or that the conditions attached to their enjoyment are being taken advantage of to the injury of another class of subjects, or of the community as a whole, Parliament is entitled, and even bound, to withdraw these very special privileges, or to alter the conditions on which they may be enjoyed. And such appears to be the present case. All authors, British or foreign, who wish to secure both the British and the American copyright, will under the new arrangement have their type set up in the United States, and probably the whole impression thrown off there too, and then have the book published simultaneously here and in America; and the disastrous effect of this on our printing and cognate industries has been already pointed out.

Some people, who appear to suffer from free trade on the brain, are opposed to any attempt to neutralize this insidious scheme of the American publishers, on the ground that any such attempt savours of protection to the printing industry. With such persons it is not our desire to argue. But it may be hoped that to readers of this article it has been now made abundantly clear that the question is really of an entirely different kind. A monopoly has, for certain reasons, been granted to a certain class of people on certain conditions. It has been found that the arrangement, which has worked well for a considerable time, will do harm rather than good in the future, and it is proposed to avoid the mischief by altering the conditions in whole or in part. Free trade is neither here nor there at present. Unlike the United States, we make no distinction between native-born subjects and foreigners, and give fair play to authors of every country, provided the first publication of their book takes place here. Unlike the United States, also, we are prepared to extend protection to the works of foreigners, already published abroad, whenever their country will do the same by our authors. It will not be necessary to depart from either of these principles. It will be necessary

rather to apply them to their full logical extent. We would propose to amend the Copyright Acts to the following effect:—

First, That whether an author be British or foreign, he shall not be entitled to a British copyright unless the book for which it is sought *has been printed from type set up within the British dominions* as well as first published in this country.

Second, That Her Majesty may, by order in Council, direct copyright to be given to authors whose books have been printed in a foreign country, provided that such foreign country gives copyright to books printed from type set up here.

This would most certainly secure what is desired, and it would do so in strict conformity with the policy of our present system of copyright, municipal and international. British authors wishing copyright both here and in America would still be able to obtain that privilege. They will merely have to pay a little more for it—the price of the American setting up—than would otherwise be the case. But it must be remembered that the British author cannot at present obtain an American copyright on any terms. So he will be better off than he has ever been before, although, like many other people, not quite so well off as he would like to be. It is also extremely probable that the American public will bear a great part of the cost of the American setting up by having to pay a somewhat higher price for the book than would have been otherwise charged. So that the expense caused by our defence against the American publishers will to a very large extent fall on the American public. But whether this be so or not, no real hardship is inflicted on the author, while a great hardship will be averted from industries of which this country has every reason to be proud.

BREACH OF PROMISE.

ALL the speeches of Cicero bear evidence of laborious preparation and careful editing. It is doubtful if any of them were delivered orally in the form in which they have been bequeathed to posterity. One series was certainly not so delivered—the speeches *Pro Milone*; for if one recollects one's classics aright, it is recorded that that worthy withdrew his defence before the completion of his trial. It showed considerable hardihood, and a very confident preference for literature to dogma, on the part of the orator, that he should issue to the public the speeches which he had prepared in vindication and magnification of a man who had eventually found it inexpedient to face out his trial. (Recent events in this country, by the way, suggest a doubt as to whether inability to face a jury is a disqualification for political leadership.) Be that as it may, there is high authority for the publication of a speech which has never

been delivered, and this is the writer's apology for troubling readers of the *Journal* with the following prelection. Carefully prepared—not indeed with a view to any pending process, but to be ready against any eventuality—it is now of no use to the writer, who has recently married (*vide Journal*, vol. xxxii. p. 98), and is therefore given without reserve to the world.

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Gentlemen of the Jury,—I am aware that, in undertaking the conduct of my own case, I have adopted an unusual course, and one which professional opinion and worldly wisdom concur in condemning. I have been moved to undertake this task not from any sense of self-sufficiency, not because I for one moment imagine that I can present my case to you with the cogency and lucidity which a professional pleader commands; but I have been constrained to discard professional assistance because I have failed to find any pleader who seems to appreciate the importance of those aspects of the case which I desire to impress upon you, and who is willing to present to you, and to found exclusively upon, those considerations which to my mind carry with them overwhelming conviction in my favour. There can, of course, be no one to whom every favourable aspect of my case, every consideration that tends to exonerate me, is more cogently present than to myself; and therefore, though my words may be sadly lacking in all those graces of speech with which the practised pleader is conversant, in conducting my own defence I shall have this assurance, that everything that shall be urged upon my behalf, whether or not it carry conviction with it to your minds, shall be absolutely sincere, and that there shall be explained to you, not those considerations which in the view of a third party might justify or palliate my conduct, but those considerations which verily determined the course I took in the matter.

Gentlemen, the action against me is one of damages for breach of promise of marriage, and the damages are laid at £5000. Now, gentlemen, the promise is not denied. I did promise to marry the pursuer. Nor is the breach of promise denied. I did break my promise to marry the pursuer. I have not resiled from that breach, I have not withdrawn from that refusal. I have declined, and I now decline absolutely, to marry the pursuer. Nothing will now induce me to marry this lady. So, gentlemen of the jury, in answer to this action I plead neither a denial of the promise, a denial of the breach, nor an offer now to fulfil the promise. I admit the promise,—I admit the breach,—but I boldly plead, and this, gentlemen of the jury, is in a word the sum and substance of my defence to the pursuer's claim, that I was justified, legally and morally justified, in breaking off the engagement, and that the pursuer cannot therefore recover damages from me for having failed to fulfil my promise. I speak subject to his Lordship's

directions, but I have no doubt his Lordship will tell you that justification, if made good, exempts me from liability.

Gentlemen of the jury, you have heard my evidence as to why I broke my engagement with the pursuer, and that evidence has not been contradicted or even seriously questioned. No other motive has been proved or even, I think, suggested. It is not, for example, said that I was disappointed as to the pursuer's prospects, or that I had committed myself to another, or involved myself in any entanglement. In these circumstances I submit, and I think his Lordship will so tell you, that you are bound to accept my uncontradicted statement as to the motives which influenced me. I broke my engagement with the pursuer because I had ceased to care for her, because I found that our tastes and temperaments were incompatible, because I was honestly convinced that by marrying her I was condemning both her and myself to a life of dispeace and misery. Now, gentlemen, I affirm that in these circumstances I was not only fully justified in breaking off the engagement, but that I was bound by every consideration of honour and of duty to break it off. Are you, gentlemen, prepared by your verdict to affirm the contrary, for if in this case you return a verdict for the defender, you do indubitably affirm that in your opinion it was my duty to proceed deliberately to bind this lady and myself for life in a union which could promise nothing but unhappiness to both of us; a union which might bind the hand and even the conscience, but which could not bind the heart,—a marriage without affection, sympathy, or honour. No, gentlemen, I cannot believe it. I am convinced that if you banish from your minds all false sentiment, all preconceived impressions, all the traditions which have gathered round cases of this kind, and figure yourselves as placed in the position in which I found myself, you will unhesitatingly affirm that I did what was best, not only for myself but for this lady, what was just before God and man, in refusing to be a party to this unhallowed union.

Gentlemen, if you are at one with me in this matter, I submit that your duty to return me a verdict is clear. The action is laid upon the breach of promise, and upon the breach alone. That is the only fault, the only ground of damage alleged against me. It may be that I did wrong, it may be that I was rash and inconsiderate, in ever becoming engaged to this lady. But that has not been pleaded against me, that has not been made a ground of damages. On the contrary, the whole case for the pursuer proceeds upon the representation that the engagement was a highly proper and desirable one; and the ground of action is not that she was cozened into an engagement with which it was found inexpedient to proceed, but, on the contrary, that having secured an engagement in every way desirable, she has been disappointed of its fulfilment. The breach, and the breach alone, I repeat, gentlemen, is the ground of action against me, and you can return

a verdict for the defender only by affirming one of these two propositions : either that I was bound to proceed with a marriage without mutual affection, and with every prospect of lifelong misery to both of us, or, otherwise, that a man may render himself liable in damages to another party by doing his duty alike by that party and by himself. I offer the pursuer either alternative ; but I deem, gentlemen of the jury, that you will be slow to accept either the one or the other, and without doing so you cannot return a verdict for the pursuer.

Now, gentlemen of the jury, if the contentions which I have urged be well founded, I might conclude here. I have often endeavoured, in so far as possible, to place myself in an independent position, and to consider what answer might fairly be made to the contentions which I have pressed upon you. But none has occurred to my mind. There seems to be no escape from the dilemma, that either I am not liable in damages, or that I ought to have committed what the conscience of civilised mankind has always treated as a pollution of the most sacred earthly covenant, by uniting myself, for reasons of mere convenience, with one to whom I could never give a husband's affection. I say, gentlemen of the jury, that I think I might stop here, and unhesitatingly ask your verdict. But I have been warned not to stand upon logic, however inexorable it may appear to my own reason. I have been cautioned not to stake my case upon any contention, however conclusive it may seem to myself. I have been urged to be careful to present to you every aspect of the case, every consideration favourable to my cause, however superfluous the task may appear to my own mind. I can well conceive too, gentlemen of the jury, how difficult it must be for you to shake yourselves altogether free from the traditions and the prepossessions which have gathered round cases of this kind, and which have impressed the popular and perhaps even the legal mind with the conviction, that, the promise and the breach being admitted, nothing remains but a question of damages.

I can conceive that a juryman may be disposed to take some such view as the following : This lady has undoubtedly suffered pain and distress through her relations with the defender, and it is right, therefore, that the defender, who is responsible for these relations, should in some measure make good to her the injury she has suffered. Now, gentlemen of the jury, I have already pointed out that the ground of action, the sole matter of complaint here, is the breach of promise ; and I think that I have made good that you are not entitled to award this lady damages upon any other ground. In this action, as laid, you have no right to mulct me in damages on the general ground that you think that my whole relations with this lady have been unfortunate to her or blame-worthy on my part. Your attention is limited solely to the breach. Perhaps, therefore, I do you injustice if I entertain any

apprehension that any of you may wander beyond the limits of what I submit is the sole question here before you ; but acting upon the principle already indicated, of assuming nothing and overlooking no considerations which, in case you take a certain line, may operate in my favour, I shall say a few words upon the general question of my whole relations with the pursuer.

Gentlemen of the jury, I can well conceive a case in which a man, though quite justified in breaking off his engagement with a lady, merited to be found liable in damages to her for his whole treatment of her. For example, where, without any affection for her, a man has entrapped a girl into an engagement owing to a mistaken belief in her wealth, idle admiration of her beauty, personal vanity, pique, mere wantonness, or any other insufficient or unworthy motive, while it is much better for all parties that the engagement should be broken off, nevertheless, I think that he has done the girl an injury, for which he may well be made liable in damages. But nothing of the kind has been alleged, still less proved against me. It is not said that I induced this lady to engage herself to me whilst there was no affection upon my part, or that I was influenced by any improper motive in inviting her to enter into the engagement. These things have not been said, and they did not, in fact, occur. I did care for the pursuer. I know, indeed, that it is the fashion when an engagement has been broken off for the offending party to allege that he has *discovered* his true feelings, or something of that sort, as if one's feelings were something hid away in a back cupboard which one may stumble upon by accident. No, gentlemen, feelings are not suddenly *discovered*, but feelings may suddenly *change*. I say that I did care for the pursuer. It may well be—your experience of the world must tell that such is often the case—that my attachment was accidental in its origin, sprang rather from imagination than from reason, and was fed more by passion than by knowledge. But attachment on my part certainly existed, and it was very real whilst it lasted. Now, gentlemen, I concede that it would be highly imprudent on any man's part if, when taken with a sudden fancy, or inspired by the passion which that fancy has excited, he laid himself deliberately out to secure a young woman's affections without any assurance that his passion for her was of an enduring character. But no such case has been made good against me. You have heard my account of the matter ; and though you could not expect the lady to be so explicit, her version, so far from contradicting mine, I think, bears it out. It would be nearer the truth, I do not say that it would be altogether just, but it would be nearer the truth to affirm that she laid herself out to gain my affections, than to say that I unduly or inconsiderately pursued hers. I do not indeed say or suggest that the pursuer in any of her relations with me transgressed the bounds of maidenly propriety and

reserve. But, on the evidence before you, I submit that the first advances towards confidence were on her part, and the determining factor in first attracting me to her was the discovery of the warmth of the feelings which she already cherished towards me. Even on the most unfavourable view of the case to myself, our first attraction towards each other was mutual and spontaneous; and therefore any such ground of damage as that which might arise from a heartless and designing courtship falls entirely away.

Gentlemen of the jury, the counsel for the pursuer has used some very severe language about both my conduct and my character. I do not blame him. I daresay that in his view professional duty required him to do so. But I protest, gentlemen, that every word that condemns me, condemns also the pursuer's case. The pursuer's case is one of damages—damages for loss, but loss of what? Loss of me! loss of marriage with me! loss of lifelong fellowship with me! Gentlemen of the jury, Christianity and all that is best of secular morality are at one, if in nothing else, in this, that they both recognise marriage as a holy and solemn covenant. Scripture and the Church have taught us that matrimony is a divine institution, and one great branch of the Christian Church has given the marriage ceremony a place among the sacraments, the most solemn rites of the Christian religion. The best secular morality, too, has repudiated as emphatically as has Christianity the doctrine that marriage is an alliance of custom or convenience, to be lightly entered into or lightly broken, and has clearly recognised that upon marriage, and upon those family relations which spring from marriage, the whole stability of the State and of society depend.

Gentlemen of the jury, I do not for one moment doubt that you all of you share those exalted conceptions of the marriage covenant; and if you do, then I submit that every word which has been spoken by the pursuer's counsel against me must utterly condemn in your eyes the pursuer's case. I have been accused of "cruelty," of "heartlessness," and of "meanness;" I have been called a "traitor," a "deceiver," an "unmanly wretch," an "unscrupulous impostor." These and other equally choice epithets have been applied to me; and then, in the next breath, gentlemen, you are asked to award the pursuer £5000 of damages! £5000 of damages because she has been disappointed of union for life with one who is cruel, heartless, mean, a traitor, a deceiver, an unmanly wretch, an unscrupulous impostor! I have some little means—marriage with me would give certain material comforts and a certain social position. These, then, are all important; the rest—the character, conduct, and disposition of the future husband—are unimportant details! Irrespective altogether of these, the marriage was desirable: the loss of it is a grievous calamity! Such, gentlemen of the jury, is the case for the pursuer, such the

conception of marriage which that case necessarily implies. You cannot, gentlemen of the jury, sever my fortune and the position I could give a wife from myself. She could not have got the former without taking the latter. In considering whether the pursuer is entitled to damages for loss of prospective fortune and position, you must carry along with you the fact that the promise of that fortune was conditional on her acceptance as a husband of one whose character her counsel on her behalf has so emphatically condemned; and that, if she has been disappointed of the promise, she has been relieved of the condition. I think, gentlemen of the jury, that if you take the pursuer at her own word as to my character, as for the purposes of this case you are bound to do, you will be of opinion, that in being released of her engagement to me, she has made a most fortunate escape. Whilst she was engaged to me, if my character be what she now represents it, her happiness lay under sentence of certain death; by being freed from her engagement, she has once more the possibility and, I trust, the prospect of happiness restored to her. Gentlemen of the jury, I cannot believe that you will take the view of marriage which the contrary of this reasoning would imply. Surely you will not, by your verdict, affirm it to be your opinion that marriage is such a matter of convention, that money and position in society are so all-important, that the character of the spouse is matter of indifference, and that it is a misfortune to a girl to have missed the fulfilment of a bargain by which, for money and social prestige, she sold herself for life to one who she now declares to be unworthy of any woman's love.

Gentlemen of the jury, there is just one other aspect of the case upon which I desire to make one or two observations. A great deal has been made of the injury to the pursuer's feelings, injury which, it is represented, has been rendered the more harassing by the fact that the engagement was known to her friends and acquaintances, and that the breach has humiliated her in their eyes. Gentlemen, if Saul has slain his thousands, David has slain his tens of thousands! If the feelings of the pursuer are so tender as her counsel has represented, can you conceive of anything more hurtful to them than the prosecution of this case, which is her own act? If publicity be an annoyance, has not that annoyance been accentuated a thousandfold by her own conduct, in taking these proceedings? In this country, gentlemen of the jury, actions of this kind are comparatively rare, for fifty breaches of promise there is not one breach of promise case; and it is not remarkable that this should be so. Few women would choose to have all the endearments of a dead courtship paraded before the public view, and their lacerated feelings exposed as a marketable commodity to the common gaze. But such, gentlemen of the jury, has been the action of the present pursuer. I do not desire to blame her personally; doubtless outside influences have been

brought to bear upon her. But here, before you, and in the eye of the law, the pursuer cannot be dissociated from the action she has taken, personally she must bear the entire responsibility of it. It was not beautiful, not gracious, not very gentle or womanly to raise this action. But the pursuer has done it. It is not, therefore, the feelings of any ordinary woman that you have here to weigh and consider. It is the feelings of the woman who could raise this action, who could come into this public Court and expose the secret recesses of her heart, who could hear read, amid the ribbald jeers of that gallery, letters which she knew were never meant for any eye but her own,—these are the feelings, gentlemen of the jury, which you are here asked to consider. It is injury to feelings which could brazen all that out that you are asked to assess at thousands of pounds of damages!

Gentlemen of the jury, my case is before you. I admit that my relations with the pursuer have been unfortunate—unfortunate to both of us. I admit that such an episode is generally more severe upon the lady than upon the man. But you can find there no ground of liability in law unless you can fix blame upon me. I leave the case in your hands with these questions: Would I have acted aright in proceeding with this marriage? Have I been blameworthy in refraining to ruin—to ruin for all that is highest and best—this woman's life and mine, in breaking a pledge which I could not keep without dishonour, in refusing to stand at the altar with the hatred in my heart and a lie upon my lips?

THE VALUATION ACTS.

II.

IN the meantime, however, the principle settled by Lord Kinnear had led to a litigation before the ordinary Courts,—a fact which incidentally suggests a defect in our present system of valuation procedure. It is clear, both upon general principles and from the provisions of sec. 34 of the Valuation Act, that the rent which is to be entered upon the Valuation Roll as the value of the assessable subjects is their gross rent. And the Act, while it makes the roll when duly authenticated conclusive evidence of value, carefully preserves any right or duty on the part of rating authorities of making deductions from it for the purposes of assessment. Now, poor rate has always been levied, not upon the gross rent or value of the subject, but upon its net value, and the parochial authorities are enjoined by sec. 37 of the Poor Law Act to make certain deductions in ascertaining the assessable value. These are described in the words of that section as “the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their

actual state, and all rates, taxes, and public charges payable in respect of the same." Lord Kinnear had found, as before explained, that a deduction should be allowed from the gross revenue of the undertaking in fixing its annual value "of all necessary outlays for management, maintenance, and repairs." His judgment had, of course, been duly given effect to, and the poor law authorities accordingly held that the value of the undertaking entered in the roll was its net and not its gross value, and refused to make the deductions from it which they had hitherto done in terms of the 37th section of the Poor Law Act, on the ground that to do so would be to make the same deductions twice over, and to undervalue the subjects for the purposes of poor law assessment. The authorities of the waterworks, on the other hand, maintained that the two sets of deductions were not by any means the same, although they might consist of the same items numerically, and that they were entitled to have the deductions prescribed by the Poor Law Act made from the value in the roll, irrespective altogether of how that value had been arrived at. The question came by way of suspension of the assessment before the Lord Ordinary and the First Division, who both held (the latter unanimously) (*Mags. of Glasgow v. Hall*, 14 Jan. 1887, 14 R. 319) that they had no power to alter the value on the roll, even if it had been wrongly arrived at, and no other course than to enforce the provisions of the Poor Law Act, and insist upon the deductions provided by the 37th section of it being made. The representatives of the water corporations make great use of this decision before the Commission as showing necessity for amendment in the Valuation laws. But in so doing they mistake the moral of the case. It shows indeed a clear repugnancy between the Valuation and the Poor Law Acts. The one defines gross value and prescribes how it is to be ascertained, and it makes the value so fixed conclusive for all purposes of assessment. The other and earlier Act deals both with valuing and rating, and equally imperatively prescribes that certain deductions shall be made from the gross value for the latter purpose. No doubt it was not intended that any double deduction should be made. When the Poor Law Act was passed in 1845 there was no Valuation Act in existence, and no general gross values available for purposes of assessment. The poor law authorities were therefore directed to ascertain gross value in each case for themselves, according to the same criterion, viz. rent, as was afterwards adopted in the Valuation Act; but as they were only concerned with the levying of the poor rate, they were further ordered to make deductions in order that it might be laid on according to net rental. The error, if there be any, lies in the Legislature, when it established a general system of gross values for general rating purposes, not having at the same time regulated this power or duty of the parochial authorities. The

decision, indeed, does not really affect the question of valuation at all, still less does it necessarily indicate any error in the present mode of valuing by ascertaining the probable rent which the subject would bring. If, in order to arrive at that rent, certain deductions have to be made, the rent thus fixed being gross rent; and if, in order to ascertain net rental, further deductions have to be made, the mere fact that these deductions happen to consist of the same items, and be of exactly the same amount, does not surely prove that the subject has been undervalued. We may pass, therefore, without further notice, any objections to the present method of valuation attempted to be based on this decision, and deal with the case against it now made for the water corporations before the Commission. The main points have been already noticed in describing the appeals taken before the Lord Ordinary, but it is further now complained that the whole system is erroneous, so far as it takes the gross revenue derived from the rates as the basis of valuation. The result is said to be "to put rates upon rates;" and in one aspect of it this is no doubt a serious consideration. Ought rates which are levied for a public purpose under statutory authority to be subjected again to other public rates similarly levied for another public purpose? Should a water rate, for example, which may have become leviable in consequence of the requirements of the Public Health Act, be subjected to other local rates,—for example, to the poor rate? The answer depends, in the first place, upon the extent and scope of the respective rates and the identity of the ratepayers. If the two rates are equally imposed over the same locality, and upon the same ratepayers, there seems to be no objection to their superposition, for the increase of the one will diminish the other. But if not, there is obvious injustice in subjecting the payers of water rate, who already pay a poor rate in respect of their private property, to a further payment for the same purpose in the shape of an increased water rate, *i.e.* a water rate which is necessarily larger than it would be on account of the necessity of raising a revenue to pay the poor rate payable by the undertaking of the waterworks. In such a case the ratepayers within the area of the water assessment must necessarily pay more than those without, and the latter are relieved of poor rate to the extent to which it is leviable from the property of the waterworks. In many rural parishes a very large proportion of the poor rates is in this way paid by the inhabitants of the towns. This is no doubt to some extent the consequence of the present system of allocating the value of the undertaking among the parishes through which its works extend; and that forms another objection to the present provisions of the Act, to which we shall afterwards advert. But apart from the aggravation thus caused, the system of valuing now under consideration would appear in itself to lead to the result mentioned. Before, however, the present principle of valuing can be condemned

as a system of "rating rates," we must be sure that it is such in point of fact. It does not profess to be so, and it is not such in literal terms. Not the revenue, but the works which constitute the lands and heritages belonging to the undertaking, are the subject of assessment. Nor is the revenue, although taken as the basis of valuation of these works, to be considered as the thing assessed, any more than is the rent of a house so to be regarded, although it is held to be the value of the house for the purpose of rating it. The revenue of the undertaking and the rent of the house are taken as the basis of the valuation of each respectively, because they are derived from the use of the subject, and the value of a thing ultimately depends upon the use that can be made of it. There seems to be no reason in principle for accepting that criterion of value in the one case and rejecting it in the other, while the plain expediency of having one uniform rule obviously points the other way. The only question therefore seems to be, whether this expediency is overruled by the inequality in the incidence of rates which may in some cases result from it. But this injustice can be obviated, as has been observed, by a proper arrangement of the different rating areas, and in that case this reason for excepting such undertakings from the general principle of valuing applicable to the rest of the country falls to the ground.

BOOKMAKERS AND AMERICAN COPYRIGHT.

A GREAT deal of interest has been excited in this country by the Bill at present before the Congress of the United States on the subject of Copyright, and this has naturally been greatest in the two great publishing centres, London and Edinburgh. The subject is a very interesting one; and though the power of any one in this country to influence the American Legislature may well be doubted, yet no one can wonder at the interest taken in it by printers, bookbinders, papermakers, and others who are employed in the production of a book. They allege that the effect of the American Bill will be to destroy, or, at least, seriously to cripple, their trade. Such a result would be greatly to be deplored. No apology is required for discussing it in this *Journal*, and a consideration of the subject naturally resolves itself into the two questions, first, are they correct in their estimate as to the effect of the proposed change? and, secondly, can it be prevented? In order to answer these questions it will be necessary to state what is the law on the subject of copyright in this country, in the colonies, in the great European countries, and in the United States. We are sorry to ask our readers to read through a dry and, what from its briefness must necessarily be, so far, an inaccurate statement of the law. It is, however, necessary and, we think, excusable. In this country

copyright in books is regulated by Talfourd's Act, passed in 1842. Copyright is there defined to be the sole right of printing or otherwise multiplying copies of a book. And by section 3, copyright in every book published after the date of the Act shall endure for the life of the author and for seven years from the date of his death; provided that this period is not less than forty-two years, which is to be the period for which copyright is in every case, at least, to endure. Thus copyright in books published after an author's death is to endure for forty-two years. This Act extends to the whole British Empire. But by a later Act it is provided that in colonies which provide suitable protection for authors, Her Majesty by order in Council is authorized to exclude this Act from operation in such colony, and allow the colonial author copyright privileges in the mother country similar to those which the colony allows to British authors. As regards foreign countries other than the United States, the subject is in this position:—Her Majesty in Council has been authorized by various Acts, commencing in 1844, to granting protection to foreign authors for their works published abroad in cases where the foreign Government guarantee a similar protection to British authors. Under this Act various treaties have been entered into with different foreign states, and some still exist. The most important fact, however, as regards foreign copyright, undoubtedly is that this country is a member of the Copyright Union established in 1887. The other countries forming it are Belgium, France, Germany, Hayti, Italy, Spain, Switzerland, and Tunis. The purpose of this Union is to recognise copyright throughout all the countries forming it in the writings of any author who shall have obtained it in any one of the nations forming the Union. This right is naturally qualified by the provision that no greater protection is to be given to any work than what is given in the country of origin, *i.e.* in the country where it was first produced, and where a work has been published simultaneously in two different countries, that country in which the protection is shortest is to be deemed the country of origin. Translations are protected as original works, provided the translation be made within ten years of the original work. And the right of dramatization is also reserved. The reader will find the terms of the Copyright Union in the *London Gazette* of 2nd December 1887, and in the opinion of all it gives the fullest protection possible to authors within the countries comprising it.

In all that has been said above, it will be seen that protection is given to an author in this country, or the colonies, or in the Copyright Union, who has published his work in a prescribed manner. "The copyright in every book which shall be published," etc., is to endure for a certain period, and publication takes place when a publisher exposes for sale. In this country, therefore, copyright may be thus defined to be the right of an author, who first

publishes a work in the United Kingdom, to enjoy the exclusive privilege of printing copies of it for his life and seven years beyond, or for forty-two years, within the United Kingdom and the Colonies, except in cases where the colonies possess special copyright laws, in which case he shall enjoy theirs; and also the like privilege throughout the Copyright Union and for the like time, except in the case where the foreign nation may not grant as long protection, and in this case he enjoys protection for the period for which it is given. Thus in Belgium copyright is given to an author for his life and twenty years, and it might quite well happen that the copyright of a work expired in Belgium before it had expired in Great Britain. But subject to these limitations, copyright privileges are afforded to British authors all through the Empire, and on the greater part of the Continent. Now this legislation has been just to authors. It was introduced to benefit them, and it has, as far as possible, had the desired effect. It has also been very favourable to the trade of those other than the author who are concerned in the production of a book, such as papermakers, printers, and bookbinders, as so many books are printed and published in this country. A large industry has grown up, and many who scarcely think they are assisting literature would soon find out how much they were dependent on it if the publishing trade received a check. And this, it is to be feared, it will soon receive. The threatened attack comes from the United States. As is well known, foreign authors have no protection within the United States. By section 4952 of the Revised Statutes of the United States it is enacted, that "copyright is vested in any citizen of the United States or resident therein who shall be the author, etc., or proprietor of a book," etc. Under this law it has been decided that "proprietor" means one who acquires his right from one entitled to copyright, as a publisher purchasing from an author; and "resident" has been decided to be a domiciled foreigner. In case, however, any one should still imagine that any privileges were conferred on foreign authors, Congress inserted section 4971, which enacted, that "nothing in this Act shall be construed to prohibit the printing, publishing, importation, or sale of any book, etc., composed or made by any person not a citizen of the United States nor resident therein." This law was passed about 1831, and as it did not remove any privilege foreign authors possessed prior to this date, the consequence has been that ever since the United States have been an independent nation they have pirated to their hearts' content the works of all foreign authors, and naturally the chief sufferers have been British authors. Their complaints have hitherto received little attention, and probably would not be attended to even now, if it were not for the fact that the United States authors were beginning to find out that they can't make a living in competition with the cheap issues of British authors; and the educated classes are also beginning to feel that the present

system is not favourable to American literature. They propose to alter it. But let us be just to American publishers; the best of them, as far as possible, do try to avoid piracy. They are in the habit of purchasing from the British publisher advance copies of a work, for which they pay the author a sum down, or a royalty on the sale. In view of the competition between publishers, this sum is naturally often small, but such as it is, it is given in acknowledgment of what is recognised as a just claim. The publishing firms who pay such sums are naturally favourable to any change that will secure them from having their publications pirated by other publishers. The publishers who give nothing to English authors are as naturally unfavourable to any change. The change proposed is to make section 4946 of the Revised Statutes of the United States read as follows—we give it at length on account of its importance:—"No person shall be entitled to a copyright unless he shall, before publication in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the Mail within the United States, addressed to the Librarian of Congress at Washington, District of Columbia, a printed copy of the title of the book or other article, or a description of the painting, drawing, statue, statuary, or a model or design for a work of the fine arts for which he desires a copyright; nor unless he shall also, not later than the day of the publication thereof in this or any foreign country, deliver at the office of the Librarian of Congress at Washington, District of Columbia, or deposit in the Mail within the United States, addressed to the Librarian of Congress at Washington, District of Columbia, two copies of such copyright book or other article, *printed from type set within the limits of the United States*, or in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of the same." From this clause it will be seen that if a foreign author observe the provisions in the clause, he will obtain the advantages of the American copyright. These are practically the same as those enjoyed under our Copyright Acts; and this protection will, of course, greatly increase the profits that a popular English author derives from the sale of his works.

This proposed change can, of course, be viewed from two points of view—the American one, and the foreign one. How far it will affect the American publishing trade we have no means of knowing; or the question whether books will be dearer, entailing as a consequence a decreased demand, does not interest us. It is criticised here only from its foreign point of view. If it pass, it will benefit British authors; and so far as it does this every one in this country will welcome it. In fact, if it were not for the words printed in italics, this Bill would be hailed with universal approbation. These words, however, are the thorn in the rose. The grievances of British authors are to be removed, and instead a grievance made for the British printer and bookbinder. The

result anticipated is that books will be printed in America, and afterwards published here either from stereotype or from imported copies. That this law will to a greater or less extent hurt the British trade can hardly be denied, but seeing that the Americans can only get the Bill passed by offering an inducement to their printers, the first thought that arises is, is it better that the authors' rights should be recognised, or that the present state of affairs should be maintained rather than injure our printing trade. Another idea that occurs is, that the Bill takes from our printers no right as regards the States that they formerly enjoyed. The protective policy of America prevents the importation of foreign printed works, and so this Bill directly takes from our printers nothing that they have hitherto enjoyed. Indirectly, however, it will affect them, and in the extreme case it would destroy their trade. Suppose all British authors to secure the advantages of the American law, and the great reading public of that country print all their works in the States, the printing trade here would be destroyed. This wont, of course, happen to the full extent, but so far as it happens it will affect us. Hitherto, in this free-trade country, printers have practically enjoyed protection, as no foreign publisher could import any edition of a work during the existence of the copyright. The only modification of this has been the privileges conferred on foreigners under the International Copyright Acts and latterly under the Copyright Union; but as regards America, the protection was absolute. Now, however, this will all be changed. The book may obtain copyright in the United States, if printed there, and then be published here. And the printers can well say this is not free trade. It is practically putting a premium on American printing, as books printed there have the run of two continents, and books printed here can only circulate in one. Our craftsmen engaged in the production of a book have thus a grievance,—the papermakers perhaps less than others, as books may still be printed from stereotype plates; but still even they and all others will be affected. If the American law passed without the objectionable clause, the printing trade might be affected. Thus if Americans entered the Copyright Union, books could be printed in the States and published here. But then we could do the same. It would be a fair field, and no favour; and if our printing trade left us, it would be because it could be more cheaply done in America: now it will leave us, if it do, on account of the premium the States offer to their printers. Finally, as we shall show immediately, the reading public would not get cheaper books. It is thus quite correct to say that the printing trade and other trades interested in the production of books will be affected by the proposed change in American copyright.

But can it be prevented? It is quite certain it has not been introduced for the purpose of benefiting this country, and though it is difficult, if not impossible, to gauge the motive of foreign

Legislatures, there is nothing seemingly to suggest that it has been introduced with the intention of hurting this country. In fact, to be just, we must admit that it was introduced with the honest intention of removing a scandal, or at least remedying an acknowledged grievance of foreign authors. But being introduced, it has to run the gauntlet of the opposition of the interests it affects. The publishers and printers who have hitherto pirated foreign authors' works will not welcome it. Therefore, to please them, and also, we suppose, to attract the support of those (and among that far-sighted people, they will not be few) who consider the change will benefit the American printing trade, the acknowledgment of the rights of foreign authors has been coupled or clogged with the condition that they print their works from type set in the States. Probably, also, the promoters of the Bill considered that some such condition would make it more acceptable to that large class of the American people who think that they ought themselves to produce everything that they use or require, and who, when reduced to read the works of a British author, will be consoled by the reflection that at least all the work which is tangible is American. There is, finally, no reason to suppose that the clause requiring the works to be printed in America will be withdrawn. The Americans are treating the subject as a purely domestic one, and it would be at once futile and impertinent in any foreign Government to presume to protest against the measure. Any redress, therefore, that the printers obtain must be derived from the action of our own Legislature. At present copyright can be acquired by any citizen of any friendly State, who is within the British dominions, at the moment when his work is published, which, of course, must be done within the United Kingdom, and probably even the temporary residence within the British dominions is not required. Besides this, there is no import duty on books in this country, and, therefore, one could at present, for that matter, print abroad and import and publish a work at present, and so secure copyright, and this is what it is feared British authors may do. They will print in America to secure the advantages of its copyright, and import an edition for publication here. There is only one way in which this can be prevented. The desire is to make British authors have their works printed in this country, and to effect this, it would have to be enacted that, saving the rights conferred on States forming the Copyright Union, no person should obtain a copyright in this country unless the book were printed from type set within the limits of the United Kingdom, or, in order to favour the interests of the colonies, from type set within the limits of the British Empire.

The arguments in favour of such a change would be: in the first place, it would protect the interests of printers, bookbinders, and papermakers; in the second place, though it would be protection and so objectionable, still, as copyright is a monopoly, the

State has the right to lay down the conditions on which it shall be enjoyed; and, in the third place, it would not tend to increase the price of books. Books are presumably at present at the value that the laws of supply and demand warrant, and the proposed change would really be to keep matters as they are at present. It would not, of course, lower the price of books, as it might keep out cheap American editions, but it certainly would not tend to raise the price. On the other hand, the objection to any such legislation would be that, once it was on the statute book, it could not easily be removed if required, and that really it is giving protection to printers. On the whole, though after some hesitation, which has, however, been quite removed, we are strongly of opinion that this is the sole remedy, and that it is a proper remedy. If the Americans make laws the effect of which will be to destroy our printing trade, and perhaps take from us our authors, it is not protection but self-protection to attempt to prevent such consequences. Copyright is a monopoly, not in any objectionable sense, but still a monopoly, and it has been granted to encourage literature. The Legislature considered it proper to encourage authors by conferring on them exceptional privileges. But it has never done anything to suggest that it has ceased to possess the right to regulate this monopoly. It could, therefore, quite fairly attach to it the condition that authors print their works in this country, and no one could say it would be giving protection to the printer and the bookbinder, for the Copyright Acts belong to a different category from laws passed to protect native industries from foreign competition. Another advantage, also, of such legislation might be that the Americans would perhaps be induced on account of it to enter the Copyright Union, if they found that unless they did they would not get the full advantage of British authors' works, and that until they did, their own authors would still have to compete against cheap issues of British works. To induce the United States to enter the Copyright Union is an aim worth striving for. If Great Britain and the United States could agree that books published in one country should have protection in the other, the publishing and printing trades in the two countries would compete on equal terms. And what would be of as great consequence as the interests of our trade, an additional bond of union would be created between the two great English speaking nations. To induce the Americans to do this may seem hopeless, but so, a few years ago, was the claim of foreign authors, and now it is admitted. It is, at least, an aim worth striking for, and one in which the printing trade could demand the support of those whose writings they help to produce.

THE LOST DIARY; OR, THE "DEVIL'S TEMPTATION."

I.

"MR. HARRY HALKLAND, Advocate," as the brass plate on the door at the foot of his stair designed him, sat one evening in his bachelor chambers in Palace Street, Edinburgh, disconsolately smoking his pipe, and "chewing the cud of sweet and bitter fancy." Heaps of sheets of music, piles of books of every sort, with the characteristic exception of legal lore, unfinished manuscripts on many subjects, golf clubs, riding whips, cigar boxes, and litter of various other kinds and descriptions, lay around him on the tables, the sofas, the chairs, and the floor, in rich profusion and in disorder most admired. A couple of packs of cards, together with a cellaret and several long tumblers on the table, seemed to signify that Mr. Harry Halkland had just been entertaining a choice company of his brethren of the Palace Street Circuit; while the settled gloom on his features indicated that he had derived but little pleasure or profit from the society of his late visitors. At last, however, the youthful revellers had bade him "good-night," and sought their noisy way downstairs, to proceed either to their respective homes, or to the domicile of some other friendly and more choice spirit, where more cards, more long tumblers, and more boisterous conversation might regale these hard wrought young men for another hour or two, e'er they sought their well-earned repose.

"This is supreme folly," said Harry to himself, as he sucked vigorously at his small black pipe, "'though yet I know no wise remedy how to avoid it,' as Orlando says. But now to finish that 'devilling' work of mine before turning in."

So saying he trimmed his lamp, drew his chair in front of the fireplace, emptied from a blue bag on to the rug a bundle of many curious looking papers, tied in separate packets, each packet with a letter neatly "backed up" and placed on the outside of it, and began work for the evening.

Harry Halkland was a very fair specimen of the typical young Scotsmen who, having turned out the clever sons of country families, go to the bar of Scotland, with hopes high bounding, prepared to "do noble deeds, not dream them all day long;" and who, after three or four years of weary waiting, begin to look on the whole thing as rather a bore, take to idling about in society, and finish by either obtaining an appointment or going to the dogs. Sometimes, though rarely, the two results are simultaneous. More frequently a man goes to the dogs first, and gets an appointment as his reward. Now and then the appointment comes first, and in a remote corner of the wilds of Scotland the banished duke, having nothing better to do, goes to the dogs there.

Harry, however, was a man of attainments that gave his friends hopes that he might some day rise to an eminence higher even than that of the gentleman last above described. His college career had been brilliant, his address was engaging, his smile frank, his manner polished and easy, his knowledge of men and books such as few of his years could boast. When he was admitted into the Faculty of Advocates, some five years before this story opens, his intellect was keen and vigorous, and his mind well-stocked with all the various kinds of information necessary for a thoroughly equipped lawyer. Only experience was requisite to make him a thoroughly successful one. But that experience, alas! had as yet never come. "Influence," in the ordinary sense of the term, he had none. Agents held aloof from the popular young man, who concealed the really serious and practical bent of his mind beneath a light and airy manner, and a certain joviality of good fellowship. And gradually, as a life of idleness was thus forced upon him, he began to give up the habit of hard reading, which had previously been to him almost a second nature. Surrounded as he was by those who were always glad of, and eager for, his companionship, his mornings were spent in idle gossipings at the fireplace of the old Hall, and his afternoons in golf on the links of the neighbouring retreat of Musselburgh—that haven of refuge for hard wrought and idle advocates alike. Whist or billiards took the place of golf on bad days; and small and late parties on the Palace Street Circuit, where the company did their best to ruin other people's reputations and their own constitutions, usually concluded the day's entertainment. No wonder that, when Harry was left to his own meditations, he characterized it all as supreme folly!

One piece of regular work, however, had recently fallen to his lot. An older brother of the bar, whose practice was as overwhelming as Halkland's was small, had recently been appointed one of the Deputes of the Lord Advocate; and, as he had neither time nor inclination to go through the whole drudgery himself—having other and more paying business to attend to—he had hit upon Halkland as one who could be relied on to help him. Regularly every day then our hero's blue bag was brought down to his rooms laden with papers that were not his own; and irregularly every night, at whatever time he felt most inclined for it, Harry sat down to "devil," as he called it, at these same papers. Strange weird stories were these which the curious little packets contained,—from the record of the life of the professional thief, just out from his second period of penal servitude, and again in custody for some trifling larceny, sending the despairing if somewhat ludicrous entreaty, "For God's sake, give me a Sheriff this time," to the suspicious conduct of the farmer whose stacks are set in a blaze through his children playing with matches, though his children are all in bed with measles, or the

vague explanation of the over insurer, who bores holes in the bottom of his ship, and is then unable to understand how his ship goes to the bottom of the sea.

All these types, and many others, passed under the keen eye of Halkland, after he had settled to his evening's work on the night in question. Reports of fire-raising, thefts, housebreaking, accidents, dog-poisonings, robberies, battle, murder, and sudden death, every form of suspicious circumstances that the west of Scotland can produce, were there for him to read, mark, learn, inwardly digest, and comment upon. As he quickly scanned each set of papers, he tossed it aside, having first scribbled some hieroglyphic on the back, which on the morrow would be carefully copied out by old Robert Douglas, the Depute's clerk, and initialled by the Advocate-Depute himself, to be retransmitted to the country as instructions for the next step in each case.

At length one bundle, larger and more formidable looking than the rest, claimed his attention.

"What's all this about?" he muttered to himself, as he picked it up, and looked at the title carelessly.

"Eva Graeme or Manners—Murder," were the words that first caught his eye.

"Great God!" With a hoarse, half-inarticulate cry he tore open the manuscripts, and gazed horror-stricken at the writing before him. Eva Graeme, the woman he had loved all her life, as a child and as a girl, and who, he had once foolishly hoped, loved him in return, who had jilted him in the most cruel and heartless way to marry Sir Theodore Manners, a west country baronet of questionable reputation, was there reported to him as having been arrested, and committed for trial, on a charge of poisoning that very husband for whose sake she had thrown him over!

The words swam before his eyes. "In so far as she wickedly, wilfully, and feloniously administered," the petition for warrant went on, "or caused to be administered, to the now deceased Sir Theodore Manners, Baronet of Dochie Hall, Dunnetshire, on or about the 15th day of October 18—, or on one or other of the days of that month, or of September immediately preceding, in or near the house of Dochie Hall aforesaid, in brandy or whisky, or in some other liquid to your petitioner unknown, a quantity of prussic acid or other deadly substance, whereby he was poisoned, and then or soon thereafter died, and was thus murdered by her."

"Inventory of Productions.

1. Retained by the Procurator-Fiscal:—

(1.) A tumbler.

2. Sent herewith:—

(1.) A medical report, dated 16th October 18—, and bearing to be subscribed, 'J. Short, M.D., T. C.

Long, M.B., C.M., or similarly dated and subscribed.

(2.) A portfolio containing a manuscript diary."

Ah, how well Harry remembered that portfolio in days of old! It was his own Christmas gift to her five years ago, when she had presented him with its counterpart. How often had he seen the gracefully poised little head bend over it, as she confided her girlish thoughts to its pages! And here it lay—evidence to bear out against her a charge of murder, and his was to be the hand to write the order to send her to her trial, and, perchance, her doom!

With a desperate resolution he set himself down to read doggedly the report from beginning to end,—first, the petition for warrant to commit for trial, then the declaration of the accused, then the evidence taken in precognition, then the medical report, and last of all the diary.

And as he read the wretched story of the miserable life which the darling of his heart had passed with the man who had sworn to love and cherish her, as he discovered his cruelty, his selfishness, his drunkenness, and his infidelity, he found it in his soul almost to hope that she *had* struck the brute dead in his cups, that she *had* killed him, as the prosecutor said she had, in his last drunken debauch.

But still he could find no proof to bring the charge home in anything he had read. Suspicion, certainly, there was, as well as provocation, even justification, he thought, sufficient to make the passionate girl he remembered so well do the deed now laid at her door; but as yet his acute logical mind could discern nothing further. Ah! the diary. As yet he had not looked into it. Quickly he glanced over its contents, till he stopped at the very last entry, opposite which was scored a large blue cross in pencil, evidently by the hand of the official who had sent it.

"Oct. 15.—This night shall end it. Death to-night, and freedom for ever. Harry, my only love, we may yet meet again," and then came a long scrawl, as though the hand of the writer had been suddenly dragged from the paper.

"Death to-night!" Good heavens! had the poor girl absolutely signed her own death warrant? Had she written down her fell purpose that with her own hand she might forge the connecting link in the chain of evidence that should bring her to the scaffold? "Death to-night, and freedom for ever!" Her husband gone, she herself would be for ever free, with "Harry, her only love," she might meet again! The thought was too horrible. It was for him, Harry Halkland, and for his sake, that she had done this awful deed, and here was he, with the duty imposed upon him of sending her to trial and to death!

O God! If only this diary had never been discovered all might have been well!

Suddenly he rose and searched a desk at the further end of the room for the diary which, in the happy days of long ago, she had presented to him. There they lay together again, but under what circumstances! How precisely similar they were!

If it had never been discovered! Again his mind reverted to the thought. If it did not exist—ah!—if it did not exist!

He buried his face in his hands, and sat stupefied, gazing into the fire, which now glowed fiercely and invitingly. How easily could a sheet of paper shrivel to a small piece of charred ash, thin as air, and, like air, disappear *into* air, as though it had never had form! If the diary did not exist! She who had sinned partly for the love of him would be saved. If it did not exist!

Hastily he tossed his own diary to the other end of the room, and sat with the fatal volume in his hands, still gazing into the fire and thinking deeply.

His scheme might be discovered, his career ruined, his upright name irretrievably tarnished; but yet there was a way of escape. Only to save her—her whom he loved! Ah!

With a shudder Halkland fell back in his chair, collapsed and cold, his eyes shut and his lips tightly compressed.

When he awoke the morning light was streaming in at the window, the lamp had burned out, in the grate there lay a heap of ashes—and the diary was gone!

Mr. Horace Hoggan, the Advocate-Depute on the Western Circuit, was a dapper little gentleman, with black curly hair, a keen eye, a commanding voice, a fiery temper, a genial nature, and an enormous practice. To Halkland he trusted implicitly in what he called the "preliminary canters" for Circuit cases; and, with regard to all the rest, he never read anything that Halkland did not specially require him to read. Instead of this, he listened as Harry narrated to him briefly the gist of each case, and then either approved or disapproved his "devil's" suggestions, in his own quick, impetuous, and imperative manner.

"An interesting murder that, in the west," he said to Halkland, one morning in the Parliament House. "Let me see all the papers in it, before I mark the indictment revised, there's a good soul."

"All right!" said Harry, with a rather constrained smile; and Hoggan was hurried away to a cause by Robert, his ever watchful clerk, as the "Diveesion Bell" was ringing.

Now if there was one thing that Harry was determined should not happen it was precisely what Mr. Hoggan, A.D., had asked should be done. Once the papers went into the hands of the quick-witted Advocate-Depute for revisal, he would at a glance dis-

cover that there was not included in the indictment the "portfolio containing a manuscript diary" mentioned in the inventory, and the whole story must of necessity come to light. For Harry, being once launched upon his course by the disappearance of the condemning piece of evidence against Eva, had determined to pursue it to the bitter end, and to conceal from his chief that such evidence had ever been before him. So far fortune had favoured him.

"I shall write the indictment in this case myself," he had said to the faithful Robert Douglas; and Robert, being only too delighted to escape doing any work whatever which necessitated the slightest exercise of brain power, had joyfully assented. And thus the indictment had been drawn with the "portfolio containing a manuscript diary" carefully omitted, but had returned from the local procurator-fiscal with the name of the unfortunate document as carefully inserted again. On the morning when the above conversation between the "devil" and his chief took place, the papers were once more in Harry's hands.

"Now for a bold move," said Harry to himself, "while Hoggan is in the middle of that difficult proof before old Hardblow." So saying he took the indictment as revised, and skilfully erased the words "as also a portfolio containing a manuscript diary." Turning next to the original inventory, he repeated the process. Then tying the papers together, he made his way to the court of Lord Hardblow, who was patiently endeavouring to master the intricacies of an interminable fight about carrot-tops, while Mr. Hoggan fumed and his junior yawned on one side of the bar, and Blandly, Q.C., and Coster, M.P., said politely bitter things to each other and to the bench on the other.

Blandly, Q.C., was gently towing a bald-headed bucolic witness through the stormy seas of a difficult examination, when Halkland took up a position at one end of the bar, bundle in hand; and, as he caught Hoggan's eye, carelessly threw the papers down in front of him.

"This must be served to-morrow," he remarked in a low tone. "I've revised it, and it is all right."

"Hum!" said Mr. Hoggan testily, "don't bother me just now," and he dipped his pen in the ink. "What's this?" he exclaimed, as he caught sight of the title of the case, "Murder! Yes. I'll take a look at this myself at luncheon time."

"The Justeeiciary Appeal Court's sittin'," said the faithful Robert, in a stage whisper somewhat redolent of his morning's "modest quencher," as he suddenly appeared hat in hand. "Camlachie is pleading his own case, and the Justice-Clerk wants to know who appears for the Lord Advocate."

"Put in my papers then," said the hard-pressed little gentleman starting up, "and I shall be there immediately. Snooks, look here," to his junior in the carrot case, "cross-examine this

witness on these lines," and he tossed an unintelligible scrawl in a note-book to his sleepy friend, who had now ceased yawning, and was slowly scraping his wig back and forwards on his head, "Here, let me see your indictment, Halkland,—m—m—yes, it's all right. Dates and names of witnesses, productions, and so on compared? Yes. Well then here goes. I'm off!" and the volatile gentleman darted away to his "Justeciary Appeal," while Harry returned triumphant into the Parliament House, bearing the doctored indictment with the imprimatur of the Advocate-Depute, "Xd. H. H.," scribbled on the back of it.

At that moment old Robert sidled up to him with a confidential smile.

"I'll tak' the papers upstairs to the Crown Office if the indictment's revised, Maister Halkland? But have ye heard the news?"

"No, what news?"

"The Glasgow fiscal is dead,—died suddenly this morning. Gude guide us, what's the matter?"

The Glasgow fiscal dead! Then the only man who knew of the existence of the diary was for ever silent. His plan could never be discovered, his plot must succeed! and Harry had swooned on the floor of the Parliament House.

"Glasgow Circuit again, my boys; and just the same as ever."

So said Mr. Clare, a youthful counsel of some two or three years' standing, as he smoked his cigarette in the room reserved for the members of the bar in the Justiciary Buildings of Glasgow.

Around him were grouped a set of barristers, some sitting in their curious high-backed chairs, others leaning lazily against the mantelpiece, others writing at the table, some engaged in reading unintelligible "instructions to counsel," some mastering the intricacies of an *alibi*, or other special defence, but all without exception smoking cigarettes.

"Nobody expected anything different," said a morose companion. "But what have you got there, M'Klink."

"Oh! the usual thing," answered M'Klink, a fair-haired, bright-eyed young man, who sat grinning over a very small piece of very dirty paper, "Assault and Robbery in a close—four five pound notes gone and never recovered, and this is a small memorandum from my client." Here he held up the small piece of paper aforesaid, and read in mock heroic tones:—"If you get me off, I will give you one of the five pound notes!"

"There's the opinion the Glasgow thief forms of you," exclaimed another, after the laughter had subsided. "He sees at once you are *socius criminis*."

"Probably because he went down to the cells in your company," cried a third.

"Who's counsel for Mary M'Guire, Plagium, Old Court?" shouted all in a breath Mr. Boss Flint, a rotund young man with a large voice and a small head, as he suddenly burst into the room.

"I am," said a grave personage, with a cold grey eye and a clean shaven face, who had been amusing himself by tilting his wig over his left eye for the last half-hour.

"Diet called then," cried Mr. Boss Flint, and burst out again.

"An important being that," said the grave personage, as he looked after the retreating figure with an amused smile. Then slowly gathering his papers together, and settling his gown, he made his way towards the court-room.

"What on earth induced Hoggan to bring Boss Flint with him?" asked Mayson, a sharp looking, square-jawed advocate, who had been restlessly pacing up and down the room, inwardly composing that most delicate of delicate tasks "a few words in mitigation." "What has become of Halkland this time?"

"Haven't you heard?" asked M'Klink. "Poor Halkland has turned very seedy. Can't sleep, can't eat, won't play cards, has grown as thin as his own afternoon shadow, 'takes no pleasure in any rational kind of amusement,' as Mark Twain says. I never saw such a change on a man in my life.—Good God! Halkland, what brings you here?"

For, as he spoke, the door was opened, and Halkland himself, pale, hollow-cheeked, and emaciated, the mere semblance of his former self, walked into the room.

"I don't know—I can't help it—I couldn't keep away," he answered disjunctedly. "Pray don't let me disturb you," and so saying he drew a chair near to the fire and sat down. "Tell me," he went on, after a somewhat awkward pause, "has it—has it—come on yet?"

"Has *what* come on yet?" asked M'Klink briskly.

"The—the—murder," replied Halkland, moistening his pale lips, and looking anxiously from one wondering face to another.

"My dear chap," said M'Klink kindly, "you're not yourself, you're ill, you know. You really should not have come here. Come, let us call a cab, and I'll go back with you to the hotel!"

"Not at all. Leave me alone!" cried Harry fiercely. Then he added more gently, "I beg your pardon, my dear fellows. You mean well, but I am not master of myself." And so saying he rose and made his way, somewhat unsteadily, towards the door.

"Halkland's a little queer to-day," said Clare sympathetically; and he touched his forehead significantly after Harry had left the room.

"Drink!" said Mayson decidedly, opening his mouth just far

enough to let the word escape, and then shutting it again like a steel trap.

"Nothing of the kind," returned M'Klink warmly, "there is something weighing on his mind, depend upon it. He was never like this before! Why"—

"Jury being balloted in the murder case," cried Mr. Boss Flint, again appearing at the door, "and, by Jove, she *is* a scorcher. Come and see!" and he was gone again.

In a moment every man of them had assumed his forensic attire; and, in a body, laughing, chattering, talking scandal, thinking of everything and anything but that a young and beautiful fellow-creature was just about to be tried for her life, they made their way towards the court-room.

The scene, however, was impressive enough to solemnize much more really frivolous persons than these were.

There in the dock, between two beetle-browed and stolid looking policemen, sat a woman, young, refined, evidently delicately nurtured, and marvellously beautiful. She was dressed in deep black, but with no widow's garb. Her face was pale and strangely untroubled, with the mark of a recent scar, still visible over the left temple. Her large and luminous eyes were gazing vacantly into space, and seemed to have a certain lack of intelligence in them, as though she had recently suffered some severe stunning mental shock from which she had not fully recovered.

"She doesn't really know where she is," whispered M'Klink, as he gazed at the prisoner.

"Or else that is the perfection of art, preparatory to a plea of insanity," answered Mayson grimly.

"Humph!" said Mr. M'Klink.

The Clerk of Court was sonorously requesting the gentlemen of the jury to answer to their names, and take their places in the box as they were called.

Mr. Hoggan, A.D., was moving restlessly about in his chair, ever and anon shifting his wig from one perch on the top of his head to another, now whispering uneasily to the acting procurator-fiscal, who was sitting on his right hand, now casting a pitying glance towards the lady in the dock, and then turning to Mr. Boss Flint, who was fussing around him like a fly at a pot of treacle, and telling him "for God's sake to keep out of his way, or he'd murder *him* next, and then advise no proceedings."

Blandly, Q.C., and Coster, M.P., the counsel for the defence, were sitting at the table in front of the dock, engaged in earnest conversation with a fine looking old white-haired gentleman, the solicitor of the prisoner.

"Not one of her relatives will look near her," the last-mentioned gentleman was saying. "It is the most scandalous thing I ever heard of in my life."

"A trying ordeal for her to get through this day, certainly," replied Blandly, Q.C. "Let us hope, with safety and triumph."

"God grant it!" said the old gentleman fervently.

But now the jury had been balloted and sworn; Blandly, Q.C., had been asked by old Lord Pittenweem, the presiding judge, if he had any objections to the relevancy of the indictment, and had replied that he did not intend to take any objection, whereupon Lord Pittenweem, in his usual gruff old manner, presumed he *had* none.

"Eva Graeme or Manners," the judge went on, "you have been served with an indictment charging you with the crime of murder. How say you? Are you guilty or not guilty?"

As she stood there in her pale girlish loveliness, lifting her large, lack-lustre eyes towards the speaker, evidently without comprehending what had been said or what was happening, not a soul of those who gazed upon her but was moved to pity and the verge of tears.

Suddenly, however, a swift flash of intelligence passed across her face, her hands were held out, as if in wild supplication, towards the seat of the Sheriffs, where sat Halkland, and with the quick, passionate, despairing cry of "Harry!" upon her lips, she fell fainting to the ground.

In a moment he had dashed across the well of the court and into the dock between the policemen.

"She is my cousin," he quickly explained; and, without let or hindrance from any one, he raised the senseless burden in his arms, and swiftly carried her down the steps from the dock to the cells beneath.

Immediately there arose a hum and buzz of eager sensation in the court. The young counsel looked at each other with significant glances. The reporters were already writing out full and particular accounts of the strange "scene" in court; and the judge was leaning over the end of the bench in deep consultation with the Advocate-Depute and Mr. Blandly.

"Tut, tut, this is an awkward business," said the old gentleman not unkindly. "That's a brisk kind o' birkie that lifted her up, ony way. A young counsel, ye say! Pair young thing! Have ye a case, Mr. Hoggan?" Then turning to the jury he said: "Gentlemen, the court is adjourned for a quarter of an hour," and hobbled off the bench.

A quarter of an hour passed away, and the spectators sat, in the stifling atmosphere of the court, eager for what was to happen next. M'Klink had ensconced himself in the seat which Harry had vacated when he leaped towards the dock, and was now listening impatiently to the droning of a Sheriff-Substitute who was sitting next him. This was the gentleman before whom the accused had been originally examined, and he was now pouring into the ear of our devoted friend his pet theory of the case, and detailing his

reasons for his sure and certain belief of an ultimate conviction. The bar room and the other court were alike deserted, except by those actually engaged in the case that was going on, and every inch of sitting and standing room, between the door and the clerks' table, was occupied by bewigged gentlemen, who were eagerly discussing the situation of affairs, and the reason of the recent strange conduct of Halkland. The city magnates, with their wives and families, occupied the seat reserved for the magistrates, while the regular attenders in the gallery craned their cravatted necks, and strained their bloodshot eyes, to obtain the first glimpse of the prisoner when she should return to the dock.

At length she and Halkland reappeared together. She was, if possible, somewhat paler than before; but the light of life and understanding had returned to her eye, and she seemed to cower in shame and confusion when she met on every side the gaze of the crowded court-room, as, clinging tightly to her companion's hand, she hastily glanced around her.

A few murmured words by her counsel to the bench; and old Lord Pittenweem graciously assented to the proposal that her relative should be allowed to remain beside her in the dock. In low, trembling tones, she pled not guilty to the charge, and sat down, still holding Harry's hand tightly clasped in her own.

Then the Advocate-Depute called his first witness.

Mary Maxwell, a decent looking, staid Scottish girl, who answered Mr. Hoggan's questions with as much asperity of tone as the learned gentleman himself was in the habit of using.

"Yes. She had been in the service of Lady Manners for four years, since a month after her ladyship's marriage. Lady Manners and the deceased Sir Theodore Manners, her husband, did not get on well together; very badly, in fact. Lady Manners was of very high spirit, and there were frequent quarrels at first; latterly, Lady Manners had become quieter, more determined like. No, she did not think she would say sullen. *What were the quarrels about, my Lord?* Oh! Sir Theodore took to drink—a great deal—ever since she went there, in fact. And Lady Manners objected. He would come home late at night very often, usually three or four times a week, and swear because he had lost a great deal of money at cards. Then he would try to make friends with her ladyship the next day. But Lady Manners did not seem to care for his attempts at 'making up.' At first she used to 'flare up;' but latterly she seemed to treat him with cold contempt. *Have I ever heard them quarrelling at night after he came home on some of these occasions I have spoken of?* Oh! yes. *Have I ever heard what passed?* Yes. *On the 13th of October last?* Yes. *Where?* In her ladyship's dressing-room. Her dressing-room was on the ground floor. All the rooms of the house were on the ground floor. It was a one-storey house. *Tell you what happened on the 13th of October?* Yes. I was in her ladyship's

dressing-room, about twelve o'clock, dressing her ladyship's hair, when Sir Theodore came home. He had driven down from Glasgow. He was slightly the worse of drink; and, at first, seemed inclined to be affectionate with her ladyship. She answered him coldly. He said that I had better leave the room. She told me to remain. I remained. She then produced a letter from the bosom of her dressing gown, addressed to him. She said it was from Madame La Faltana, and that he must cease befriending her as he had done. She said that she had known of his intimacy with Madame for a long time. They had a dreadful quarrel over it. She said that he must either give up Madame La Faltana, or she would leave him. He dared her to leave him, and said that he would punish her for adopting the high tone which she had taken with him, by bringing the Faltana to that house the very next day. She grew very pale, and rose and said that if he dared put such an insult on her, she would kill him. He laughed at her, and left the room. She then dismissed me, seeming rather put out that I was still there, and asked me to say nothing about what had passed. I said nothing to anybody.

"On the night of the 15th October, her ladyship told me, at ten o'clock, that she would not require my services, and that I had better go to bed. I was very tired, having been kept late up for some nights; and so I went. Her ladyship had seemed very strange since the 13th. I thought she was brooding over her husband's treatment to her, and what he had threatened.

"I heard a great noise in the middle of the night, and wakened a fellow servant of mine, Margaret Duncan. We ran to my mistress's dressing-room, and there found Sir Theodore lying on the couch dead, Lady Manners lying insensible on the hearth-rug, with a large cut in her forehead, and a tumbler lying in the middle of the floor. A woman, whom I afterwards learned to be Madame La Faltana, was standing wringing her hands in the middle of the room. I said, 'Oh! what is the meaning of this?' or words to that effect. The woman, pointing to Lady Manners, said, 'She has killed him! she has poisoned him!' I was very much put about; but we got her ladyship, who was quite unconscious, put to bed, and sent off for the doctor. He came about four in the morning. That is all I know."

Cross-examined by Blandly, Q.C.:—"Lady Manners was always a kind mistress to me, gentle and considerate to all her household. Oh! oh! oh!"

Here the staid Scotswoman, without the slightest premonitory warning, suddenly burst into a passion of sobs, looking down sideways, every now and again, from behind her handkerchief at the lady in the dock, and then bursting out afresh. As suddenly as she began, however, she stopped again, put away her handkerchief, and appeared as calm as before.

"Don't let me distress you unnecessarily," said Mr. Blandly

kindly; "but I believe you all had a feeling of respect for her ladyship?"

"Not a servant in the house that did not worship her!" replied the witness in trumpet tones.

"Go it, Mary!" muttered M'Klink to himself. "That girl's a brick."

"But for her sweet ways, Mary would not have lived a day in the house with such a man as her master. But he was dead, and she would say no more about him. No, she would not distress herself, as Mr. Blandly politely asked her not to, and she would bring her mind back to the night of the 13th October. Her mistress had been very depressed that night when she sent for her to dress her hair. She did not talk much, but she sighed a good deal. Before her husband Sir Theodore came home, she had told Mary to take two of her dresses in a present, as she would never require them again. The dresses were almost new. She was surprised at being offered the dresses, but thanked her mistress kindly all the same. As the trouble came so soon after, she never got the dresses. She had told exactly what passed on the night of the 13th. Her mistress was excessively angry when she used the words, 'I will kill.' She was quite certain the words were, 'I will kill you.' Her mistress was not a vindictive woman, far from it. She herself did not believe at the time that her ladyship meant to threaten the life of her husband. She thought the words she used were spoken in the heat of passionate indignation, in answer to the insulting threat of Sir Theodore that he would introduce Madame La Faltana into the house.

"There was one window in her mistress's dressing-room, looking south. At the opposite side of the room was a writing table, easily visible from the window. The door was at the east end, the dressing glass at the west. The fireplace was on the same side as the writing table, and there was also a door on that side communicating with her mistress's bedroom.

"On the night of the 15th, when she heard the noise, and rushed to the room, she entered by the door at the east side. The writing table was in its usual place. No, she was not quite sure of that. She seemed to remember that it was pulled farther into the middle of the floor. There were writing materials on the table, but what these were she could not say. A chair was overturned. Her mistress was lying on her back on the hearth-rug, with her feet towards the east door. The couch on which Sir Theodore lay dead was at the end of the room opposite the fireplace. Madame La Faltana was walking up and down the room between them, saying excitedly, 'She has killed him, she has poisoned him.' She remembered nothing more that Madame said."

Re-examined:—"She had got presents of dresses from her mistress on several occasions before this."

By Mr. Blandly:—"But never such new dresses as these."

"That's a fine, straight girl," said M'Klink to the Sheriff-Substitute next him, as Mary stepped down from the box.

"Yes! But she'll hang her mistress," replied the magistrate magisterially.

"Humph!" answered M'Klink.

The next witness was Margaret Duncan, who simply corroborated her fellow-servant, as to the relative positions in which they discovered the three occupants of the dressing-room on the night of the 15th October.

Then Mr. Horace Hoggan nervously adjusted his tie, pulled his wig over his eyes, and scratched his nose with the end of a quill pen—all signs of unusual excitement with the little man—as he rose to announce the name of his next witness—Elise Manton, or La Faltana.

(To be continued.)

CRIMINAL LIABILITY OF EMPLOYERS.

As a general rule it may be said that a master is not criminally responsible for the act of his servant; in other words, that if a servant in the course of his employment commits an offence against the law, the master is not liable criminally in respect of that offence. To this rule there are some exceptions, and the decisions in which a master has been held criminally responsible have for the most part been decided under the Licensing Acts. In *Mullins v. Collins*, L. R. 9 Q. B. 292, 38 J. P. 84, the appellant was charged under section 16 of the Licensing Act, 1872, with supplying liquor to a constable on duty. It was proved that liquor had been supplied to a constable, who was in uniform, by a barmaid in the appellant's service. It was argued *inter alia*, that though there might be some evidence that the barmaid knew the constable was on duty, yet there was no evidence that the appellant knew it; but the Court held that such a construction would render the Act a dead letter, for any person might avoid it by keeping out of the way, and the Court held the master was liable if, in effect, the servant knew she was supplying a constable on duty. In *Bosley v. Davis*, 12 Q. B. D. 84, 39 J. P. 774, it was proved that a police constable was in a street at about 12.30 in the morning. He could see through the windows of a hotel in the street three gentlemen playing cards. He entered the house, went upstairs to the room, and found six gentlemen round a table, with a quantity of money on it. The manageress of the hotel said she did not know that they were playing cards, and her statement was confirmed by the players, who were in a private room. On a charge preferred under section 17 of the Licensing Act, 1872, of suffering gaming on licensed premises, the Court held that the

case must be sent back to the justices, with an indorsement of the opinion of the Court, that although actual knowledge on the part of the appellant or his servants, in the sense of seeing or knowledge of the card-playing, was not necessary to be shown, yet that some circumstance must be proved from which it could be inferred that they connived at what was going on. Constructive knowledge, they held, would supply the place of actual knowledge. Cockburn, C. J., referring to the words of the section, said that a man might be considered to suffer the thing to be done if it was done through his negligence. It is to be observed upon this case that upon the facts as stated there was no evidence of knowledge upon the part of the manageress, or of any of the servants in the hotel, that card-playing was going on. The next case decided under the same section, was that of *Redgate v. Haynes*, 1 Q. B. D. 89, 40 J. P. 70. In that case it was proved by witnesses that, while standing in the public street at Epsom between 1.30 and 1.45 in the morning, they could hear the conversation of three persons in a room in a hotel, and from what was heard, it was clear that these persons were playing for money. No direct evidence was given that the landlady of the hotel knew of the gaming. She said that the house was closed at 11 P.M.; that the three men were then in their private room; that she saw no cards, and did not supply any, and did not know of any card-playing. The hall-porter, whose duty it was to attend upon customers, said that he closed the house after 11 P.M., and retired to his own chair in a parlour beyond the bar, at the extreme end of the house. He knew nothing whatever of any gambling. The justices drew the inference from the porter's evidence that his chair was removed to the greatest possible distance from the room where the gambling was going on, in order that he might not hear what passed, and they thought that the appellant knew that gaming was intended to be carried on, and that she purposely took care not to know what her guests were doing. On these grounds they convicted her. The Court held that the appellant was responsible for the conduct of the hall-porter whom she left in charge of the hotel; that there was evidence that the hall-porter suspected what was going on, and connived at it, and that this evidence justified the conviction. Blackburn, J., said: "The mere fact that gaming was carried on on her premises would not render the appellant liable to be convicted, because that is not 'suffering' the gaming to be carried on, but if she purposely abstained from ascertaining whether gaming was going on or not, or in other words connived at it, this would be enough to make her liable; and where the landlady goes to bed she is still answerable for the conduct of those whom she leaves in charge of the house; and if those persons connive at the gaming, she is responsible." The principle of this decision appears to be that a licensed person will be responsible criminally for an offence against the Licensing Acts, if that

offence is committed by a person whom he has left to act in his place in the management of the business, and a licensed person cannot escape liability by handing over the management to some one else. In *Crabtree v. Hole*, 43 J. P. 799, the appellant was charged under the same section with suffering gaming. It was proved that the appellant had gone to bed, leaving "boots" to attend to the house, and the justices found, as a fact, that "boots" had knowledge of the gaming, but wilfully shut his eyes and ears. It was held that the appellant had been rightly convicted. The Court held that this case could not be distinguished from *Redgate v. Haynes*. In *Somerset v. Hart*, 12 Q. B. D. 360, 48 J. P. 327, it was proved that gaming had taken place upon licensed premises to the knowledge of one of the servants of the licensed person who was employed on the premises, but there was no evidence to show any connivance or wilful blindness on the part of the licensed person, and it did not appear that the servant was in charge of the premises. It was held that the justices were right in refusing to convict the licensed person. The principle of this case may be stated as follows: Proof of actual knowledge on the part of a licensed person is not necessary; it is sufficient if it is proved—(1) that the landlord might have known what had taken place if he had cared to do so, or (2) that the gaming took place with the knowledge of some person clothed with the landlord's authority, or with the connivance of that person. The servant in the case, it should be mentioned, was not in charge of the premises, but was a mere potman employed to supply guests. The case of *Cundy v. Lecocq*, 13 Q. B. D. 207, 48 J. P. 599, was decided under section 13 of the Licensing Act, 1872, which makes it an offence for any licensed person to sell intoxicating liquor to a drunken person. A publican had sold intoxicating liquor to a drunken person who had given no indication of intoxication, and without being aware that the person so served was drunk. It was held that the prohibition was absolute, and that the knowledge of the condition of a person so served with liquor was not necessary to constitute the offence. This case does not bear directly upon the question of the criminal liability of a master for the act of his servant, but it is important, because it was decided that the word "knowingly" had been purposely omitted from section 13; and it is to be observed that the same word is omitted in section 17, although it occurred in the corresponding section of 1 Will. IV. c. 64 (section 13); and it will be seen hereafter that this omission was regarded as of importance by the Court in a very recent case. The next case is that of *Newman v. Jones*, 17 Q. B. D. 132, 50 J. P. 373. In that case the appellants, who were trustees and members of the managing committee of a club, were convicted for selling liquor without a licence to persons who were not members of the club. It appeared that the liquor was sold in the club by the steward, who, in selling, acted contrary

to the orders of the appellants, and without their knowledge or consent. The money received for the liquor was paid into the account of the club. It was held that the conviction was wrong, for the appellants were not, under the circumstances, responsible for the act of the steward. Smith, J., delivered an elaborate judgment, in which he reviewed a number of cases, including *Mullins v. Collins* and *Cundy v. Lecocq*. He said that what *Mullins v. Collins* decided was, that a licensed person was liable for the act of his servant within the scope of his employment; but it was no authority for the liability of the master for the act of his servant outside the authority given. With regard to *Cundy v. Lecocq*, he said that that case was decided upon the special wording of section 16; but while it might establish that guilty knowledge was not a necessary ingredient of an offence under that section, it did not decide that the master was liable for the act of his servant when the servant acted in direct contravention of the orders given. It is very difficult to reconcile this case with *Redgate v. Haynes*; for assuming, as the Court did, that the steward was the servant of the trustees, he was undoubtedly left in charge of the premises, and might be said to be clothed with the authority of the trustees. The latest case on the subject is that of *Bond v. Evans*, decided on the 12th of June last by Manisty and Stephen, JJ. There the appellant was a licensed person. He employed a man called Owen to manage a skittle alley, which formed part of the licensed premises, and to attend the persons frequenting the same, and Owen had received from the appellant general directions not to permit gambling in the skittle alley. Upon one day, however, two constables found some men playing cards for money in the skittle alley, Owen being present and cognisant of the acts of the men. The appellant was not present, and had no actual knowledge of the card-playing, nor had Owen ever communicated with him on the subject. Manisty, J., said that section 13 used the word "permit," whilst section 17 used the word "suffer," and he drew apparently some distinction between the two terms. Stephen, J., attached no importance to the distinction, and it is probable that Manisty, J., would have been of the same opinion had he referred to the decision of the Court of Appeal in *Ex parte Eyeston*, 7 Ch. D. 149, where the Court held that the two words meant the same thing. Manisty, J., however, pointed out that the word "knowingly" was used in sections 14 and 16, sub-sec. (1), while it was omitted in section 17, and the old Acts prohibiting gaming on licensed premises had also made use of the term "knowingly." From this he drew the conclusion, apparently, that knowledge was not necessary; but this cannot be reconciled, as it seems to us, with the early decisions, where it was held that some knowledge, actual or constructive, on the part of the licensed person, or the person left in charge of the premises, must be proved. He followed the early cases, distinguishing them from *Somerset v.*

Hart and Newman v. Jones, and he decided in effect that Owen, having been left in charge of the skittle alley, knowledge on his part must be taken to be knowledge on the part of his master. The decision in this respect is quite consistent with *Redgate v. Haynes*. The conclusion to be drawn from the cases appears to be as follows, at least with reference to section 17: "It must be proved either that the master knew of the gaming or that he connived at it by wilfully shutting his eyes to the fact; but a master may be convicted, though he had no knowledge on the subject, and did not himself connive at the offence, if there was such knowledge or connivance on the part of a servant who has been intrusted by him with the management of the premises in his absence. With regard to the other sections of the Act, it would appear, from the judgment of Smith, J., in *Newman v. Jones*, that though under some sections of the Licensing Acts guilty knowledge on the part of any person is not an ingredient in the offence, yet this does not alter the principle by which it must be determined whether the master is criminally responsible.—*Justice of the Peace*.

CONDITIO DEFENDENTIS.

YOU'LL find that in the ancient Roman law,
 Digested by Tribonian, no 'prentice,
 There is a very wise and learned saw,
 That "Melior est conditio defendentis."

And many ages after, Boniface
 T' his *Corpus Juris*, which a monument is,
 Did add this maxim in its proper place,
 That "Melior est conditio defendentis."

"Possession is nine points o' th' law." How blest
 If you possess aught, this predicament is l
 This phrase, in learned legal Latin dressed,
 Is "Melior est conditio defendentis."

It somehow is assumed that ev'ry thief
 Until he's guilty proved, quite innocent is;
 Experience shows how false is this belief,
 That "Melior est conditio defendentis."

In love affairs this maxim ne'er did hold;
 Bardell *against* Pickwick a precedent is;
 For juries did not understand when told
 That "Melior est conditio defendentis."

If you're in debt up to the very eyes,
 A cession will clear off what to you lent is;
 While baffled creditors can but heave sighs,
 That "Melior est conditio defendentis."

A workman now is hurt; he makes a claim:
 His case is bad: he quite indifferent is:
 The master's bill of costs will be the same,
 For "Melior est conditio defendentis."

If he perchance appeal to Court supreme,
 And issue to a Scottish jury sent is;
 Lord So-and-so will dwell upon the theme,
 That "Melior est conditio defendentis."

Pursuers just look on and see the fun,
 While it's "on spec" the work of their agent is:
 But he may find, when th' battle's lost and won,
 That "Melior est conditio defendentis."

And so in these degenerate latter days,
 It's "Heads I win, and tails you lose," that meant is,
 When lawyer speaks of party rich and says,
 That "Melior est conditio defendentis."

The Month.

NOTES FROM LONDON.

THE Attorney-General, in a letter to Mr. Yerburch, M.P., has settled a difficult problem which Sir Henry James referred some years ago for solution to the Bar Committee:—Under what circumstances may a barrister act for a client without the intervention of a solicitor? Sir Richard Webster's answer is: Only in matters which neither are nor likely to become litigious. The difficulty of drawing a line between contentious and non-contentious business is considerable. Where a barrister acts as a solicitor, will he be responsible for negligence or want of skill? If not, the concession conveyed by the Attorney-General's opinion will have little practical value, except to stimulate the movement towards fusion.

* * *

THE recent *causes célèbres* offered an opportunity and provided an audience for the display of judicial and forensic wit. And the Bench and Bar of England rose to the occasion. The Lord Chief

Justice, who sometimes sits at the Old Bailey, confessed his ignorance of who was the Director of Public Prosecutions, wondered why a witness with the patriarchal name of "Moses" should change it to "Mordaunt," and was profoundly innocent of the terminology of the turf. Mr. Lockwood spoke of jockey's licences being cancelled "without compensation;" Sir Charles Russell and Sir Henry James had an elegant little wrangle over the copyright in private letters; while Mr. Charles Mathews, a promising junior of some sixteen years' standing, invited members of the Jockey Club to sit in the Queen's Counsel rows. The bench has lately resembled nothing more than the dress circle of a theatre.

* * *

MR. RUEGG, who represented the plaintiff in the *Times* libel action, was "called" in 1877, and has written a little work on Roman Law for the use of students.

The Status Ebrietatis in our Courts.—By common consent, the inebriate in relation to his normal environment, like the lunatic, is conceded to be out of harmony. Intoxication extenuates improper conduct in popular judgment, when that conduct is not extremely criminal in its character. So that, while inebriety by common consent modifies the popular verdict, upon conduct at variance with law and propriety in minor degree, actions highly criminal in appearance find no excuse for crime, because of the inebriety of their perpetrator. This unequal judgment is made, not because essentially there is nothing in inebriety that modifies and perverts the natural will, but because it is deemed unsafe to society to concede to inebriety an excuse for crime, or unlawful misdemeanours, and this chiefly because the condition of inebriety may be voluntarily induced, and a state of alcoholic irresponsibility might be assumed and simulated for criminal and other unlawful purposes. But the fact exists and remains that a condition of the brain may be induced by alcohol, both voluntarily and involuntarily, in which the normal brain volition and natural impulses are changed, and at variance with the natural character—a diseased condition of the brain, chiefly and most directly in its circulation, but underlying that in its most minute organization.

There are inebriates who cannot help being such. They are victims of a neuropathic endowment bequeathed by a neurotic and unstable brained ancestry, who come into the world dowered with a heritage which as certainly and fatally leads to inebriety, under slight injudicious indulgence, as in other branches of the same neuropathic family the more palpably seen and indubitably recognised forms of nervous disease, such as epilepsy and mania,

are developed from slight causes, which would not in more fortunate individuals have brought into view anything abnormal.

This latent neuropathic heritage which, in the one case determines an inebriate, in the other a lunatic, an epileptic, or a paralytic, should be taken account of as an accessory before the fact, at least (and in this case contrary to legal precedent) should exempt, in a measure, the victim, whose crime is only possible because of the overpowering influence of this antecedent neuropathic accessory. In this case the accessory is the tyrant-principal.

The law, it is clear, in every case of inebriate misdemeanour, should go behind the police records and look into the neurological history, and discover, if possible, the ancestral and immediate organic factors which may modify or make impossible full responsibility, by fettering or preventing the normal volition. The will cannot be free though it may appear so, *prima facie*, in an individual so tyrannically endowed that he cannot pass a saloon without entering in to take a drink, even though in doing so he violates all the proprieties of life, his own previously formed resolutions, and his highest interests.

There are, undoubtedly, elements of disease in inebriety, as there are elements of crime in it. It should be the duty of the law, instead of regarding its victims always as criminal, when they are arraigned for crime or misdemeanours, to inquire diligently how much is crime and how much disease; how much are the natural character and inclination changed by overpowering and nonpreventable disease, and to what extent might the disease have been averted.

Here the intelligence and self-knowledge of the individual as to his organic make-up should become a lawful question, as I believe it should in every question of mental derangement or mental soundness.

A toxhæmic influence, powerful enough to produce indurative changes in the brain, to harden the albumen of the tissues, and produce cerebral sclerosis and peripheral neuritis, as well as the more immediate vaso motor paralyses, and consequent vascular disturbances of the brain and other viscera, cannot be, and ought not to be, ignored when the normal functioning of the organ affected by it, whether stomach, liver, or brain, is in question. Where immediate physical aberration does not follow alcoholic toxhæmia, it may follow, and is apt to appear, in a succeeding generation. The alcoholism of one generation may be, and often is, the insanity or epilepsy of the next, or *vice versa*.

The record of neuropathic decadence due to alcohol, as given by *Morel*, and confirmed by all observations since, should convince us, without the necessity of further illustrative example here, that the volitional impairment and psychopathic and other neuropathic perversions of alcohol, as patent significance, and worthy of judicial

consideration as the recognised crime and vice it engenders. Alcohol entails disease of the brain as certainly as it vitiates morals and fosters vice.

It is certainly a very imprudent kind of jurisprudence that takes legal account of the one class of effects, and does not recognise the other.

As I write this note, I have in mind the involuntary criminal record of a young man of otherwise reputable family, who is now serving a life sentence for the automatic alcoholic murder of a dear relation, murdered incidentally and accidentally, and, I believe, as stated by the young man, not consciously, whose home, beginning with the germinal life in his mother's womb, was in a bed of alcohol, whose conception proceeded from, and was consummated by, a chemically alcoholized father and mother, who became himself a periodical drunkard in early boyhood, and an involuntary matricide at twenty. The governor, in view of the extenuating circumstances of this unfortunate young man's birth and hereditary environments, justly, we think, commuted his sentence, for only the Great Omniscient, who knows the frame of such unfortunates, and considereth the unseen elements that so modify responsibility in the organic potency of impossible hereditary morbid endowment, could determine the exact extent of this young man's guilt.

The history of the O. Z. family, as detailed by me in the *Alienist and Neurologist*, vol. iii. No. 4, is but a sample of a class of cases continually obtruding themselves upon the attention of the neurologist, to mould and modify his convictions, at variance with the commonly promulgated view of the law, that the inebriate is always responsible for his conduct, and sometimes held as doubly responsible, because both of his intoxication and its sequence. Unlike the Law, sound Neurology and Psychology would inquire into the predetermining organism, and the responsibility of the criminal for the organic conditions, if any, which may have predetermined the apparent crime.—*Medico-Legal Journal*.

* *

Eminent Modern Authorities on Trial by Jury.—Our readers will recall the article on the jury system from the pen of Mr. Justice Miller, the senior justice of the Supreme Court of the United States, printed in our last November issue. It will be seen that this eminent and experienced judge advocates the system in general, but suggests the propriety of some substantial reforms. Those of our readers who have within reach the work of the late Judge Taylor on the Law of Evidence, will know that that respectable authority discusses the system at very considerable length, expresses a pessimistic view of its value in civil cases, and points out that the professional estimate of its value in such cases in England is steadily declining, as shown by the greatly increased

number of jury waived cases in the Courts. We now have the pleasure of laying before our readers the opinions of still more eminent English authorities upon this interesting and controverted question.

Not long since Herr Gustav Edw. Fahlerantz, a distinguished Swedish advocate, investigated the English system of trial by jury, and published several *brochures*, advocating the introduction of the English system into his own country, in the place of the *næmd* or official jury of twelve men, which is in use there. His arguments were met by the objection that the English system was falling into discredit in that country. To assure himself on that point he wrote letters, in 1886, to several eminent English judges, whose personal acquaintance he enjoyed, and received the answers which we are now permitted to publish. The first was from Lord Herschell, then Lord Chancellor, and was as follows:—

“46 Grosvenor Gardens, London, July 14, 1886.

“MY DEAR MR. FAHLERANTZ,—I have pleasure in complying with your request that I should state my opinion whether (as you tell me has been asserted) the system of trial by jury has fallen into discredit in this country. I have no hesitation in saying that, as far as I can judge, and I have had ample means of forming an opinion, trial by jury is held by a large majority of jurists, whether judges or advocates, as well as by the public at large, in as high esteem as ever, so far as regards the trial of criminal charges, and of certain classes of civil cases.

“The impression that the system is in less esteem than it was, has probably been derived by the writer to whom you allude, from the fact that there is a growing belief, shared alike by judges and suitors, that juries have been often employed for the trial of certain cases, for the trial of which they are not the best juridical instrument.

“There are very many actions which depend on the determination of mixed questions of fact and law, where it is difficult to separate the two and determine what is for the judge and what for the jury. Again, there are many cases where the facts are so complicated that it is difficult to formulate simply the questions which the jury have to determine. For such cases as these, I think a jury trial eminently unsuitable, and that it is only in those cases, in which issues of fact can be completely detached from questions of law and formulated clearly and simply for the decision of a jury, that the mode of trial can, with advantage, be adopted. But, for the trial of such questions as I have just alluded to (and I may give as examples, questions of negligence, defamation, personal injuries, fraudulent representation, commercial usage, etc.), I entertain a strong opinion that a jury is the best tribunal. And I think this opinion is generally entertained by the profession. . . .—Believe me, yours sincerely,

“HERSCHELL.”

The second, from Lord Coleridge, the Lord Chief Justice of England, was as follows :—

*“Heath’s Court, Ottery S. Mary, Devon,
27th December 1886.*

“SIR,—In England, and even in Scotland, where the procedure differs from our own, and the jury system has never obtained much favour in civil cases, it has always been carefully and even zealously maintained in criminal cases. I think no one here, however dissatisfied with it in civil matters, ever thinks of getting rid of it in questions of crime. It works on the whole in such questions fairly well; partly, I think, because there is no appeal, and therefore the sense of responsibility is greater, both on the judge and on the jury, than where there is an appeal; partly because, as a rule, the issues are simple and intelligible, and, speaking generally, the evidence is not long nor complicated. It relieves the judge also of a weight of personal responsibility which (I speak for myself) he would find almost intolerable in cases of any gravity, quite intolerable where the question is one of life or death. In some details our system, even in criminal matters, admits of improvement; but, speaking broadly, I am heartily for maintaining it in such matters. As to civil causes, opinions differ very much. Some think it works well and is a wise system; others think it an absurd and mischievous system,—absurd because it often submits questions to a tribunal wholly ignorant of and incompetent to deal with them, and mischievous because it lowers, or has a tendency to lower, the character of advocacy, and leaves advocates to appeal to passion and prejudice rather than to reason and argument. Long experience and much reflection have led me to give up the opinion in favour of it which I formerly entertained, and to adopt strongly an opinion adverse to it in civil cases. In a body so large as the thirty or forty judges, there may be, perhaps always, some who are vain, self-sufficient, passionate, incompetent; and it may be that since I was young juries have grown worse, or I have grown more critical. But now if I had a question of character or property in which I was interested, I would far rather run my chance of getting a bad judge to try it than a good jury. Judges, even the worst, are at least, to some extent, amenable to the opinion of their profession, and, on the whole, the opinion of the profession is very rarely wrong.—I am, sir, your very faithful servant,

“COLERIDGE.

“GUSTAF E. FAHLCRANTZ, ESQ.”

The third, from Sir James Hannen, President of the Probate, Divorce, and Admiralty Division of Her Majesty’s High Court of Justice, the oldest as to service of the English judges, expresses the following views :—

"Athenæum Club, Pall Mall, April 12, 1886.

"MY DEAR FAHLORANTZ. . . .—I do not think that there is the slightest desire on the part of any considerable number of lawyers or laymen to do away with trial by jury. I have never heard any objections raised to it except in a few instances by judges who, as Chancery men, having had no experience in dealing with juries before the Judicature Acts, did not know how to manage them. For my own part, my confidence in juries is rather increased than diminished. If I had any litigation, I should prefer submitting the question to a jury, to one of the judges taken at random. There is an impersonality about the jury which is very valuable;—being collected by chance, it represents public opinion in a manner that satisfies; and even the unsuccessful suitor goes away with the feeling that the verdict in the circumstances was inevitable. He blames the witnesses, his counsel, or even the judge; but he rarely, if ever, blames the jury. . . .—Yours very sincerely,
"JAMES HANNEN."

The fourth and fifth, from Sir Charles Edward Pollock, one of the judges of the Queen's Bench Division, and certainly one of the most eminent of the English judges, were as follows:—

"Putney, June 17, 1886.

"DEAR HERR FAHLORANTZ. . . .—I cannot at all agree with the statement that in England, whether it be by judges, advocates, solicitors, mercantile men, or the educated classes generally, it is considered that the jury system is useless.

"In modern times there are many cases which cannot be consistently tried by a jury, such as those which involve matters of account, of local inquiry, or requiring some special scientific knowledge, as chemistry or engineering; and for these our law provides a special tribunal to deal with them, such as a judge with a skilled assessor or an arbitrator.

"There are also cases which involve intricate mercantile details, and in which questions of law and fact are so mixed that it is difficult to separate them. These also are better tried by a judge alone.

"Wherever there is a simple issue to try, of fact, or where a question of some mercantile custom or usage arises, a jury is our best and usual tribunal, and is so considered by all. This applies still more to cases in which personal character is involved, such as actions for libel or slander, for dismissal from employment, and the like.

"In all cases which can properly be tried by a jury, I think the people of this country still prefer that mode of trial.

"During the last few years a good practical mode of judging whether this is so or not has arisen. It is now allowed in most cases that the plaintiff may elect to try by judge alone, or by

judge with a jury. When first this was allowed, the number of trials by judge alone were about as many as those by jury; but they have recently decreased, showing the opinion of the people. There would no doubt be fewer still, were it not that in many of these cases it is known that the defendant defends and goes to trial merely for delay, and that there will be no real issue to try. . . .—Believe me, ever yours very truly, C. E. POLLOCK.”

“*The Croft, Putney, London, January 3, 1887.*

“DEAR HERR FAHLCRANTZ. . . .—I have no difficulty in answering your question as to Trial by Jury in Criminal Cases. I have never heard it suggested by any English judges or jurists that it should be abolished.

“In the ordinary criminal cases there is far less legal difficulty than in the trial of civil disputes, and the questions are such as are best solved by those who are familiar to the habits and motives of their fellow-citizens; and therefore it is desirable that the jury should consist of men who live in that district of the country in which the crime was committed.

“Further, the question of not guilty or guilty is best dealt with by stripping away all forms, and deciding broadly and upon clear grounds what is the nature and character of the act charged, and what is the motive; and though the reasoning of each jurymen may differ, if all agree to a verdict of guilty, we feel more content than if a single judge had arrived at the same conclusion.

“Two more grounds strengthen this view: 1. Criminals are usually of the lower orders of the people, and the people are better content to be judged by their fellows than by a judge of higher rank and higher education. 2. Where the crime is of a political character, unless there is an open rebellion, trial by jury is essential to the freedom of the people. These are but well known and often repeated views, though I have stated them in my own language.

“I enclose you an excerpt from an article in our *Law Quarterly Review* upon County Courts, written by C. C. Judge and a very able law writer (Chambers) as to Juries in Civil Cases. I am glad to hear that you are treating the subject so fully—shall be pleased to hear the result. . . .—Yours truly,

“C. E. POLLOCK.”

The following is the extract above referred to:—

“When the parties can afford the expense of a jury trial, I think a jury is a far better tribunal than a judge for dealing with questions of fact. The more I see of juries, the higher is the respect I have for their decisions. A judge is always embarrassed by the feeling that his decision is in some sense a precedent. Juries are haunted by no such spectre, and have only to deal with the particular case before them.”

Similar views were orally expressed to Herr Fahlcrantz by the Lord Justice Lindley, Sir James Charles Matthew, and other of the English judges, and were embodied by him in the publications already spoken of.

We are glad to say that we have the renewed promise of an early article from the pen of Herr Fahlcrantz upon the curious workings of the Swedish jury called the "*Næmd*." It may have a peculiar interest for our readers from the fact that our jury system is believed to be of Scandinavian origin.—*American Law Review*.

* * *

Cooper v. Cooper, 13 App. Cas. 88, is a Scotch case, but deals with two matters which are of wider interest than inquiries depending for an answer on peculiarities of the law of Scotland. The House of Lords decide, in the first place, that it is competent for the House when sitting as a Scotch Court of Appeal to take judicial notice of English and of Irish law. This doctrine conforms to precedents and to common sense, yet as a matter both of theory and occasionally of practice it may give rise occasionally to curious difficulties. Their lordships, when hearing Scotch appeals, are as much a Scotch Court as is the Court of Session, and logically it is not easy to see why it is more competent for the House of Lords than for the Court of Session to take judicial notice of English or Irish law. The common sense answer, no doubt, is that their lordships are the most eminent English lawyers, and that it were ridiculous for them to ignore their own knowledge and seek information from inferior authorities. This reply, like most of the solutions supplied by common sense, does not reach the bottom of the difficulty. When their lordships sit as a Court of Appeal for England they will, we presume, take judicial notice of Scotch law, but it were mere flattery to suppose that the majority of their lordships can on a question of mere Scotch law compare as experts with the judges of the Court of Session. Meanwhile, historians, if they ever thought it worth while to study law as a portion of history, would do well to note how much the position of the House of Lords as a final Court of Appeal has done to consolidate the union betwixt Scotland and England.—*Law Quarterly Review*.

* * *

Urquhart v. Butterfield, 37 Ch. Div. 357, must in its result have grievously disappointed the plaintiff, or rather the legatees whom he represented, and it also must bitterly disappoint every lawyer interested in legal theory. The legatees must have been disappointed, because after attaining a decision in their favour on questions of considerable intricacy and nicety, they lost a large legacy because they could not make out that their testator was

domiciled in Scotland. Theorists must feel deep disappointment because the case merely raises but does not decide one of the most curious problems connected with the conflict of laws, a problem which has been constantly debated by jurists, and has never been solved by any English Court. D.'s minority is according to the law of his domicile of origin attained at the age of twenty-one; according to the law of the country where he is residing it is attained at fourteen. Is it at fourteen or at the age of twenty-one that he acquires the capacity for acquiring a domicile of choice in the country where he resides? This is the question that would have been raised if the Court had held in *Urquhart v. Butterfield* that the testator, Mr. Hoyes, intended to acquire a domicile in Scotland. Unfortunately the Court held, and with good reason, that under no view of the circumstances was he ever domiciled in Scotland. Their decision may put off for a century or more the solution of an enigma which has long harassed every one occupied in studying the conflict of laws.—*Law Quarterly Review*.

* * *

In re the Institution of Civil Engineers, 20 Q. B. Div. 621, determines that the Institution of Civil Engineers is a body "for the promotion of education, literature, science, and the fine arts," and as such entitled to claim that the annual value or income of property belonging to the body shall be exempted from taxation under 48 and 49 Vict. c. 51, s. 11, sub-s. 3. The decision of the Court of Appeal in this case reverses the judgment of the Queen's Bench Division. The Court of Appeal, moreover, are not unanimous. The result therefore is that the opinion of three judges is overruled by that of two. Laymen will take this as showing the absurd uncertainty of the law. It shows, however, nothing of the kind. No skill in draftsmanship can do away with the difficulty of applying principles to facts. Whether a society such as that of the Civil Engineers is a body "for the promotion of education, literature, science, or the fine arts," is one of those inquiries on which the opinion of equally competent men will always be divided. The true moral of such decisions is twofold: first, that the expediency of having more than one Court of Appeal is doubtful; secondly, that Parliament would act wisely in not increasing exemptions to the general rules which determine liability to taxation.—*Law Quarterly Review*.

* * *

In commenting on the death of Mr. James Anderson, Q.C., the *Law Journal* says:—"Mr. Anderson was one of the veterans of the law whose first degree was taken in 1828 as a member of the Faculty of Advocates. His success at the Scotch bar tempted him to go south, and seven years later he was admitted a student of Lincoln's Inn, but changed to the Middle Temple before his call.

which took place after four years' probation. As an equity draftsman and conveyancer for twelve years he had a considerable practice, but after more than twenty years as a Queen's Counsel he was content to take the office of Examiner to the Court of Chancery, which was exchanged in due course for that of Official Referee, which he held to within a few years of his death. Meanwhile he had twice contested Scotch boroughs, and had married within twenty years of his death, which took place at the age of eighty-five."

* *

COACHMEN, on pain of dismissal, may not, without permission, drive their own friends in their master's carriages. Such is the wholesome rule laid down in *Thomson v. Stewart*, June 7 (Second Division). *Per* the Lord Justice-Clerk: "I do not say that the use of his master's carriage for the conveyance of other people might not, under certain circumstances, have been a venial offence. It is, however, a thing which a master is not bound to submit to; and I think any master is entitled to dismiss a servant who does it."

* *

WHEN a verdict is returned against a party upon a ground which, although not pleaded by the opposite side, has been suggested by the party's own evidence, he cannot have the verdict set aside upon the plea of surprise. Thus a man sued road trustees for damages in consequence of his child having been drowned in a burn through the alleged fault of the defenders, and the jury found that there had been contributory negligence "on the part of the pursuer, who, while living in fear of the burn, made no complaint to any authority as to the danger." The pursuer had dwelt upon his own fears in support of his evidence of the defenders' want of care.—*Murray v. Lanark Road Trustees*, June 9, 1888 (Second Division).

* *

THE case of *Burnett v. Crabb*, June 12, 1888 (First Division), discloses really a curious chapter in Scottish ecclesiastical history. How, it may be asked, came Scottish Episcopalians and United Presbyterians to be fighting over the same sum of money, and to have each a plausible plea for claiming it? Associations differing so widely, both theologically and socially, are not likely to have been confounded by even the most hazy of testators. This case has been dealt with *con amori* by the Lord President, who has traced its history with that clearness which characterizes him.

* *

In the year 1743 an Episcopal chapel was erected in the town of Brechin. At that period the Act of Queen Anne was in force, and all that was necessary for legal Episcopacy was ordination by

a Protestant bishop, and the taking of certain oaths. Then came the rebellion, and following upon it, as an effect, the Penal laws, which rendered it imperative that the ordaining bishop should belong to the Church of England or of Ireland. The Brechin congregation, being a lawful one, must have complied with the provisions of these statutes. It seems to have got into low water, and had to borrow from its more prosperous, if less orthodox, neighbours who formed the Relief congregation in the same town. A wadset over the church or chapel was granted, with this stipulation, that if the Presbyterian creditors ever ceased to belong to the Relief Synod, the wadset should cease, and the building revert to disponees upon payment of the sum borrowed. Having with the money borrowed paid off their debts, the licensed Episcopal congregation ceased to exist. Some of them, curiously enough, joined their Presbyterian brethren—a proof of the *low* or moderate doctrine which must have then prevailed. Others joined another body of Episcopalians, which happier and more tolerant days had developed, and which is now represented by the Scottish Episcopal Church of Brechin. The Relief congregation, in its turn, became extinct, having been merged in the United Presbyterian Church. The trustees of the original chapel, built in 1743, came to be represented by a judicial factor, who, having redeemed the buildings, and sold them for a good price, found himself in the possession of a considerable sum, for which two claimants entered appearance. The Scottish Episcopalians pleaded that they were the true representatives of the original owners, while the United Presbyterians of Brechin maintained that, as the chapel had been licensed under the Penal statutes, it could have had no connection with the Scottish Episcopalian body, which was Jacobite and outlawed. They further urged that the fact of a number of the old congregation having joined their ranks, gave them a right to represent the original proprietors of the chapel. But, as the Lord President pointed out, the chapel had been Scottish Episcopalian before the passing and after the repeal of the Penal statutes, while there had been a breach of contract arising out of the union of the Relief party with the United Presbyterians which would bar the claim of the latter. “The strict ground of judgment,” said his lordship, “seems to be that the chapel was built in the year 1743 by and for the use of the Episcopalians in Brechin, and that the moneys arising from the sale of the chapel, in consequence of its disuse and the failure of the trust on which it was held, ought to be given to the only parties who now represent the Episcopalians of Brechin.”

* * *

ALTHOUGH the judgment of the Sheriff dealing with the election of a trustee in bankruptcy is final, the Court of Session is entitled to consider the reasons by which that judgment is supported; and if

they disclose an excess of jurisdiction, an appeal is competent, and the case may be remitted to the Sheriff. *Per* the Lord President: "The law holds that a refusal to exercise a lawful jurisdiction is an excess of jurisdiction."—*Farquharson v. Sutherland*, June 16, 1888 (First Division).

* * *

IN the recent case of *Grim v. Gardner & Sons Limited*, June 22, 1888 (First Division), some important remarks were made bearing upon the subject of judicial remits made by the judge without consent of parties. The Lord President said: "It is always a question for the discretion of the Court whether the mode of inquiry by way of remit is one which, in the circumstances of the case, ought or ought not to be adopted. But there is also a question involved as to the rights of parties; for the pursuer is entitled to prove his case in the ordinary way, and the defenders have an equal right." Lord Shand referred to the classes of cases in which the Court are entitled to do this: "For example, in cases dealing with fixtures, in which it is impossible for the Court to see the articles in dispute, but in which when we have before us the report of a man of skill, we are then enabled to settle the rights of parties. A remit is also of great convenience, and even a matter of necessity, where the question to be determined is, whether or not a machine is up to contract; and accordingly I am disposed to hold that in such cases it is the proper mode of ascertaining facts, and that in such cases the Court has the power to, and should, make a remit to a man of skill without requiring the consent of parties."

* * *

IT is incompetent under the Debt Recovery Act for the Sheriff to remit to the Sheriff-Substitute to carry out his judgment.—*Wilson v. Bennet*, June 23, 1888 (First Division).

* * *

A MOTHER is not incapacitated from acting as guardian, under the Guardianship of Infants Act, to the children of her first marriage, by the fact of her having contracted a second marriage. The question was, of course, suggested by the fact that at common law a second marriage operates as a disqualification. In the recent case of *Campbell v. Maquay*, June 27, 1888 (First Division), the Lord President proved too conservative to accept the suggestion that our older decisions were irreconcilable with modern opinion. He considered it dangerous, but it was clear to his mind that the statute did not take account of any principle of common law which might be opposed to any provision of the Act.

IT is satisfactory to learn that Miss Stirling has won her case in the action recently raised against her by John Mackay for the custody of his child. The Lord President suggested the true motive which had led to that action, viz. a desire to extort money. Another blow has thus been struck at the barbarous notion that a parent, however worthless, has supreme control over his children.

Notes of English, American, and Colonial Cases.

PARLIAMENT.—*Registration—Notice of objection—Address—Registration Act, 1885 (48 Vict. c. 15), s. 18, schedule 3, form 1, No. 2.*—In a notice of objection to a county voter, the objector described himself as of "Churchyard," on the list of voters for the parish of Petersfield:—*Held*, that the description was insufficient. *Humphrey v. Earle*, 47 L. J. Rep. Q. B. D. 124.

Wollett v. Davis (4 Com. B. Rep. 115; 16 L. J. Rep. C. P. 185) follow. *Ibid.*

PARLIAMENT.—*Registration—Notice of objection—Amendment—Parliamentary and Municipal Registration Act, 1878 (41 and 42 Vict. c. 26), s. 28, sub-s. 2.*—A notice of objection to a voter on the freemen's list of the city of Norwich stated as the ground of objection "that you do not reside at the above address" (12 Clifton Street, Norwich). In order to make the objection valid under 2 and 3 Will. IV. c. 45, s. 32, the revising barrister amended it as follows: "That you have not resided at the above address for six calendar months next preceding the 15th of July last, and that you have not throughout that period resided within the city of Norwich or within seven miles thereof":—*Held*, that the amendment was not within the powers in that behalf contained in 41 and 42 Vict. c. 26, s. 28. *Bridges v. Meller*, 47 L. J. Rep. Q. B. D. 125.

PARLIAMENT.—*Registration—Objection to voter—Description of objector—Forms—Substantial defect or variation—48 and 49 Vict. c. 15, s. 18, schedule 2, form 1, No. 2.*—An objector gave to a voter a notice of objection to his name being retained on the Parliamentary list, in the form given in schedule 2, form 1, No. 2, except that he signed it "R. B., of 624 W. Road, on the list of Parliamentary voters for the Parliamentary borough of B. and C.":—*Held*, reversing the decision of the revising barrister, that the omission of the name of the parish, on the list of the Parliamentary voters of which the name of the objector was, constituted a substantial defect and invalidated the notice of objection. *Wood v. Chandler*, 47 L. J. Rep. Q. B. D. 126.

PRINCIPAL AND AGENT.—*Broker—Authority to sell shares on Stock Exchange—Contract made according to the rules—Undertaking by principal to indemnify agent.*—A person who employs a broker to sell shares on the Stock Exchange authorizes such broker to make a contract of sale in accordance with the rules and regulations there in force, and undertakes to indemnify the broker against any liability incurred by him under those rules, unless the rules relied on by the broker are either illegal or unreasonable and not known by the principal. *Harker v. Edwards* (App.), 147.

THE JOURNAL OF JURISPRUDENCE.

MR. PARNELL *v.* "THE TIMES."

UNTIL an action is called in Court the public are not supposed to have any cognisance of the dependence of proceedings, but it would be affectation upon our part to ignore the fact, which has been so widely canvassed, that Mr. Charles Stewart Parnell, the leader of the Irish Nationalist party, and a domiciled Irishman, has raised an action of damages for slander in the Scottish Courts against the proprietors and publishers of *The Times*, who are domiciled Englishmen. The nature of the alleged slander, and the course of events which have led up to the raising of the present action, are matters of such public notoriety as not to bear recapitulation here. It is obvious, too, that any speculation as to the truth or falsehood of the charges made, or as to the probable issue of the action, would not be in place in this journal or at this time. One or two general observations, however, upon legal or non-contentious aspects of the case may not be without interest to our readers.

The case is peculiar though not singular in our Courts, in so far as it is an action raised by one domiciled without the jurisdiction against another also domiciled outwith the same. Jurisdiction, as is understood, has been founded by the arrestment of money due to *The Times* in the hands of its creditors in Scotland, and the validity of such jurisdiction in an action such as the present, we need not tell our readers, is undoubted. It frequently happens that the privilege of arrestment is invoked by resident Scotsmen to render foreigners amenable to the jurisdiction of our Courts, but it is rarely that a foreigner evinces such a preference for our procedure as to employ this remedy against another foreigner to secure the benefit of a trial in Scotland. The fact, however, that the pursuer, who has chosen to avail himself of the remedy, is himself a foreigner in no wise affects the validity of the arrestment. If, therefore, the arrestment has been well laid on, there can be no doubt of the jurisdiction of the Court of Session to try this question. If the Court have jurisdiction, they are bound to

exercise it. It is true that there is a plea known to our law of *forum non conveniens*: and the Court have sometimes sustained that plea to the effect of refusing to try a case. But this happens only where proceedings to try the question at issue are in dependence before some other and more convenient tribunal. Now, as no process in which Mr. Parnell can recover the damages here sought is at present in dependence, or is likely to be in dependence in any other *forum*, it is clear that no question of *contingency* can arise to affect Mr. Parnell's right to have the cause tried in Scotland. It is true, indeed, that the Legislature has intrusted a Special Commission with the investigation of the charges which form the basis of the present action. But as that inquiry is not a lawsuit before a competent Court, and cannot in any event put damages in Mr. Parnell's hands, it is clear that *The Times* cannot raise any plea of contingency in respect of the proceedings of the Special Commission. The Act, however, under which the Commissioners are to hold their inquiry, contains a clause of indemnity to the effect following:—

"If any civil or criminal proceeding is at any time thereafter instituted against any such witness (*i.e.* a witness who has received a certificate signed by the Commissioners stating that the witness has on his examination made a full and true disclosure), in respect of any matter touching which he has been so examined, the Court having cognisance of the case shall, on proof of the certificate, stay the proceeding, and may in its discretion award to the witness such costs as he may be put to in or by reason of the proceeding."

We understand that Mr. Parnell's summons was served before the Act of Parliament became law, and, notwithstanding certain suggestions which have been made to the contrary, we think it too clear for argument that the clause of indemnity cannot apply to this action.

The course taken by Mr. Parnell has occasioned various comments and explanations in regard to our legal procedure, in which quite the usual amount of ignorance has been displayed. We have read, for example, that in Scotland a jury may return a verdict by a majority of nine to three, and that this case, in which the summons has just been served, will probably be tried in October. It would be rash even for us, with all our experience of the procedure of the Court of Session, to hazard any conjecture as to the probable date when a case of such magnitude and difficulty will be brought to trial. Defences are not due until the 15th of October, and in the circumstances, even if the case were of the most conventional character, the issues would not be adjusted until the second week in November; and then parties could hardly get a day for trial before the Christmas sittings of the Court. It is hardly credible that the present case will be disposed of so expeditiously. An appeal to the Inner House before the issues

are adjusted, and the cause finally prepared for trial, is almost a matter of certainty. This will occasion a month's delay, and if thereafter, as is probable, a Commission to America is required, other two months will be consumed in its execution. It is improbable, therefore, that, if the case be proceeded with, it will be brought to trial before the second or third month of next year.

There has been, as was natural, much speculation as to the motives which have induced Mr. Parnell to take these proceedings in the Scottish Courts. It is impossible to dissociate this action from the creation by the Legislature of a Statutory Commission to investigate the charges which have been made by *The Times* against the Irish leaders. Before the Commission was heard of, Mr. Parnell was again and again challenged to take legal proceedings, and taunted with his failure to do so. But until the creation of a Commission of Inquiry was an accomplished fact, Mr. Parnell refused to bring the charges against him before a jury. It is doing Mr. Parnell no injustice, therefore, to conclude that he dislikes and distrusts the Statutory Commission: and justly or unjustly dreads the result of their inquiry. So much, indeed, was obvious from his conduct during the discussions on the measure in the House of Commons. The situation was a most awkward one. It was impossible for Mr. Parnell, with any decency, to refuse the Government's offer when first made to him; and once he had accepted the principle of the measure, it became impossible for him to do more than to object to details; and impossible, on the other hand, for the Government to withdraw the measure, owing merely to opposition to details. The only hope, therefore, of the Irish leaders was in vigorous, unanimous, and prolonged resistance on the part of the Gladstonian party to the Bill. This, however, was not accorded, and accordingly, after protestations which were marked by unusual excitement and bitterness on his part, Mr. Parnell found himself face to face with the statutory inquiry. It is in these circumstances that the Irish leader has had recourse to the Courts of Scotland. In the opinion of many of his friends, Mr. Parnell has committed a tactical blunder in taking these proceedings. We do not know, but there can, we think, be no doubt that he has committed such a blunder in not taking the proceedings earlier, if he were going to take them at all. It is clear that he takes action unwillingly. He has been goaded into it by the creation of the Commission of Inquiry. Clearly, therefore, the Commission Bill was intensely distasteful to him. But it was in his power to have stopped that Bill at any time, by an intimation that he had elected to appeal to a Court of Law. The Government had all along protested that, in their view, a Court of Law was the proper tribunal for the investigation of these charges. It would, therefore, have been impossible for them to have persevered with the Bill in the face of such an intimation by Mr. Parnell. But the Irish leader waited just a day or two too long, hoping,

perhaps, that the Commission Bill would find shipwreck. That hope has been disappointed; and so now he has before him the double distress of a statutory inquiry which he dislikes, and a litigation which he has striven hard to avoid.

There can be no doubt that the action in our Courts is intended to defeat or discredit the Commission inquiry. It may be that Mr. Parnell was under the impression that by taking these proceedings he would render the action of the Commission so obviously nugatory that their inquiry would not be proceeded with. In this hope, if he entertains it, he is likely to be disappointed, for the Commissioners seem now to have no alternative but to proceed, without regard to the proceedings in Court. It is possible, therefore, that if this turns out to be the case, the proceedings in Scotland will be seen to be futile, and will be abandoned. On the other hand, it may be that Mr. Parnell has taken proceedings in Scotland because he believes that the tribunal will be more favourable to him than the Statutory Commission, and trusts by a favourable verdict in the Court to discredit any adverse findings by the Commissioners. What reasons, personal or otherwise, Mr. Parnell has for distrusting the Commission we do not know, but it is clear that alike by the terms of the remit and by the nature of the tribunal, the Commission can make much wider, more general, and more searching inquiries than is possible in a Court of Law. That is one ground why Mr. Parnell may prefer the Law Courts, and another is, that by raising an action he can choose the charges upon which he asks a verdict. Again, general results impress the public mind far more than do particular details. Now, if the Commission were to report that certain of the charges had been substantiated, others had fallen through, that would be regarded as a report adverse to Mr. Parnell. On the other hand, before a jury, Mr. Parnell, in the position of pursuer, will be entitled to demand a verdict in his favour if on any counts *The Times* fails to substantiate its charges.

The question remains, Why, if he preferred a Court of Law, Mr. Parnell should have come to Scotland? It may perhaps be surmised that he believed that the state of public opinion in Scotland afforded him a better chance of a politically favourable jury. If so, we are not sure if he was right in his surmise. The jury to try such a cause will probably be a special one, and amongst the classes from which a special jury is drawn the great preponderance of political opinion in Scotland is not, we think, in sympathy with Mr. Parnell. It may be, however, that he was influenced by the information that Scottish procedure allowed less latitude for the raising of collateral issues than is customary in the English Courts, that in Scotland the defender is limited more rigidly in probation to an answer to the pursuer's case, and that both in examination and cross-examination all parties are confined more closely to their respective averments upon record, and to matters strictly pertinent

to the issue. Mr. Parnell may have been influenced by information of this kind. We do not profess such acquaintance with the rules of evidence and procedure in the English Courts as to warrant us in pronouncing any opinion as to whether such information would have been well founded. A perusal of the reports of some recent English cases, notably, for example, that of *Wood v. The Licensed Victuallers' Gazette*, does indeed suggest that in the English Courts greater latitude is allowed than we are here accustomed to. But both parties in the present case, if we may trust the newspaper reports, are in strong hands, and if the case proceed to trial, those who love hard fighting are not likely to be disappointed.

DUTIES OF NAUTICAL ASSESSORS AT BOARD OF TRADE INQUIRIES.

THERE is a manifest tendency in certain quarters to allow nautical assessors at Board of Trade inquiries into shipping casualties to enlarge their proper duties, and to usurp the function of the judge in the conduct of these inquiries, with detriment alike to the public interest and to the parties more immediately concerned. The recent inquiry in Glasgow into the collision between the steamers *Princess of Wales* and the *Balmoral Castle* affords a very striking illustration of the disadvantages of such a tendency. In that case it would appear that from the first the conduct of the inquiry, though nominally before the Sheriff, was in reality controlled by two at least out of the three nautical gentlemen who acted as assessors. Assessors at such inquiries are too apt to think that their proper function is not to assist the Court in relation to matters purely nautical, but to act the part of judges in matters strictly legal; and it not unfrequently happens that under their influence the Court is led to utterly inconsequential and inaccurate results, unless the presiding judge is strong-minded enough, and sufficiently alive to his own proper function, to maintain an independent position. In one case, that of the *Vicksburg* inquiry, some years since, to which we shall presently refer, the evils of this system were completely exposed, with the result that on appeal a manifestly erroneous judgment, pronounced under the overpowering influence of the assessors, was reversed, and the Board of Trade was saddled with heavy expenses.

The facts elicited in the inquiry into the unfortunate collision between the *Balmoral Castle* and *Princess of Wales* are few and simple. The latter vessel had just been built, and was engaged on her experimental trial trip in the neighbourhood of the measured mile between Skelmorlie and Wemyss Bay on 16th June last. She was still in the hands of the builders, who were navigating her under charge of a Clyde pilot and a runners' crew.

The *Balmoral Castle* had finished a voyage in London in the spring of the present year, and had there discharged her crew. Her owners had determined to supply her with new engines and boilers, and had entered into a contract with a Clyde shipbuilding firm for the execution of the work. Under the contract the shipbuilders took possession of the *Balmoral Castle* in London, and engaged a pilot and runners' crew to bring her down to the Clyde for the execution of the work. Before she left London the *Balmoral Castle* was practically dismantled, her cylinders being taken out, and a portion of her engine gearing removed. She was thus reduced to what one of the witnesses described "as a mere hulk," and she was towed all the way from the Thames to the Clyde. Under their contract the builders were taken bound to restore the vessel to the owners again in London in the month of June on completion of their contract. At the time of the collision she was still in the possession of the shipbuilders, who had nearly completed their operations on her, and had sent her on an experimental trial trip, in order to test her speed at the measured mile at Skelmorlie. For this purpose they had engaged a river pilot and a runners' crew, and at the time of the collision she was entirely under the charge of the pilot acting on the employment of the shipbuilders. All the witnesses examined at the inquiry, including the pilot himself, admitted that the pilot of the *Balmoral Castle* was alone in charge of her, and that he and the crew were employed and paid by the shipbuilders and engineers. The pilots of both vessels were properly qualified men, and were duly licensed for the purposes of Clyde navigation. During the trial trips of the two vessels at the measured mile at Skelmorlie, while they were respectively under the charge of the pilots specially engaged for the purpose, the vessels collided, and the *Princess of Wales* was cut in two, and sunk.

It was nowhere stated in evidence that Captain Chapman had anything to do with, or was in any way responsible for, the navigation of the *Balmoral Castle*. He had, however, been master of that vessel on her previous voyage which ended in London. In no sense, however, was he the master of the ship at the time of the collision. She was in no condition to require a master in the sense of the Merchant Shipping Acts until she had been completed by the builders, and obtained her new certificate; and that certificate she could not obtain until after completion of the experimental trip on which she was engaged when the collision occurred, the Board of Trade Surveyor being on board at the time for the purpose of enabling him to test her engines and grant the requisite certificate. It was, moreover, established by documentary evidence at the inquiry that Captain Chapman was engaged by the builders to take the vessel from the Clyde to London, as master and pilot, immediately upon the conclusion of her experimental trip, and it was intended

that he should enter upon these duties *after* the return of the vessel from that trip to Greenock, where he had to ship his crew under articles to take the vessel to London. Naturally, however, he was on board the vessel at the time of the collision, but he was there just as the owner and his friends were there, to see how the vessel worked on her trial trip, and, as he said, he was anxious to see how her engines and steering gear were working, seeing that he was to take command of her on her voyage from the Clyde to London. It is material to notice, however, that his being on board was not a necessity, but a mere accident of the occasion. He had nothing to do with the responsibility of her navigation. This was acknowledged by the solicitor who conducted the inquiry as the responsible representative of the Board of Trade; and although the formal questions submitted to the Court referred to the master of the *Balmoral Castle*, the Board of Trade solicitor frankly stated in express terms, at the conclusion of the debate, that he could make no charge against Chapman in the capacity of master of that vessel on the occasion in question. Not only were the owners and pilots of the two vessels separately represented by their several solicitors, but appearance was made by two other solicitors on behalf of the representatives of the unfortunate men whose lives were lost in the collision, and from none of these quarters was it ever once suggested that Captain Chapman could be regarded as master of the *Balmoral Castle* on the occasion in question, or in any way responsible for the casualty. From the beginning of the inquiry, however, it became apparent that certain of the assessors entertained the belief that Captain Chapman could not escape responsibility, and in the course of the inquiry the assessors put sundry questions with the object of establishing his responsibility for the casualty as master of the ship at the time of its occurrence. In the ultimate decision which was given, the Court held that Captain Chapman "was to all intents and purposes the master of the *Balmoral Castle*," and the judgment proceeded to state that "the Court fails to see how Captain Chapman can be exonerated from taking a share in the responsibility of this unfortunate casualty, resulting in the loss not only of a valuable ship and three lives, but almost of the whole of those on board the *Princess of Wales*, but under the circumstances the Court does not deal with his certificate."

Now, with all respect for the Court, it is almost impossible to conceive a more inconclusive judgment than that just quoted. If the Court could not exonerate Captain Chapman of responsibility in so serious a matter, it was bound in the public interest to have dealt with his certificate. If, on the other hand, he was not legally responsible for the consequence, then the imputation which is made against him was uncalled for, and might indeed be more strongly characterized. It was obviously arrived at through the influence of the nautical asses-

sors, who had in the course of the inquiry shown the unmistakable bent of their opinions on the subject. It must be apparent that this was a purely legal question, depending upon, in the first place, the requirements of the Merchant Shipping Acts in regard to the necessity for, and qualifications of, a master for a vessel in the circumstances in which the *Balmoral Castle* then was; and, in the second place, upon a construction of the facts disclosed in the evidence. It involved no question of nautical skill; and it cannot be doubted that upon a construction of the evidence and the terms of the Shipping Acts, Captain Chapman was not master of the vessel *quoad hoc*, either *de facto* or *de jure*. She did not require a certificated master for such a trip. She was in charge of a qualified pilot, engaged for the special purpose of her trial trip within the Clyde limits, on the measured mile, where local knowledge was in the main alone needful. That local knowledge Captain Chapman did not possess, and did not profess, and, indeed, in his engagement he expressly stipulated that he should not take charge of the trial trip, as was clearly proved. On the other hand, the pilot expressly engaged for the purpose, possessed both the local acquaintance and the required nautical skill. The pilot was, indeed, the *de facto* master of the ship for the trip, and he was properly qualified for the office.

The duties of nautical assessors were very clearly defined by the Master of the Rolls (Brett) in the case of the *Beryl*, 17th June 1884, 9 Law Reports (Probate Division), p. 141, in the following terms:—"The tribunal which has to try the case is the judge himself, and the judgment is his, and his alone. The assessors who assist the judge take no part in the judgment whatever; they are not responsible for it, and have nothing to do with it. They are there for the purpose of assisting the judge by answering any question as to the facts which arise of nautical skill. They have nothing to do with the credibility of witnesses, unless that credibility depends upon a knowledge of nautical affairs specially. They have nothing to do with whether the evidence proves that vessels were at one distance or another at any given time. That is not their function. All that is to be decided upon the responsibility of the judge, and upon the evidence before him, and upon his view of that evidence. But nautical questions may arise in the course of the case with regard to particular facts of the case, and he is entitled to ask those questions in order to guide him in applying any general rule that may exist to the particular facts before him. Therefore, before such a tribunal, the final question which has to be decided is a question solely for the judge. The judge is bound to give great weight to the opinion of the assessors, but, at the same time, if he does not think their view right, he is not bound to follow it. Still, it would be impertinent in a judge not to consider, as almost binding upon him, the opinion of the nautical gentlemen who, having ten times his own skill, are called in to

assist him." No doubt that was a suit in the Admiralty Court, but the same principles are obviously applicable to a Court of Inquiry. The Merchant Shipping Acts provide that the Court of Inquiry, for hearing a formal investigation, shall be composed of either (1) a Wreck Commissioner, (2) a Stipendiary Magistrate, or (3) two Justices of the Peace, who shall have the "assistance of an assessor or assessors of nautical, engineering, or other special skill or knowledge, to be appointed by the Commissioner" or other authority constituting the Court, "out of a list of persons for the time being approved for the purpose by a Secretary of State." The Shipping Casualties Investigations Act of 1879 conferred a right of appeal against a decision of the Court in the event of the cancelling or suspension of the certificate of a master, mate, or engineer; and had the judgment of the Court now under consideration dealt with Captain Chapman's certificate, there can be no doubt that an appeal would have put the matter quite right. It appears to us that Captain Chapman has something to complain of when the Court goes so far, as it did in this case, in practically holding him responsible, and yet did not venture to give a logical conclusion to its judgment by dealing with his certificate,—thus depriving him of his right of appeal, while attempting to stamp upon him some share of the moral responsibility for the casualty. The injustice of such a result is apparent.

We have incidentally referred to the *Vicksburg* inquiry, which formed the subject of an appeal to the Court of Session some years since (29th October 1884, 22 S. L. R. p. 22). That inquiry took place before two Justices of the Peace, with the assistance of three assessors; and on that occasion the assessors really conducted the inquiry, and succeeded for a time in giving effect to their views of the evidence by holding the Captain responsible and suspending his certificate. The Court of Session, however, quashed the judgment of the Court below, with costs. In that case the Court of Inquiry attached undue importance to the evidence of one witness, who showed a very evident *animus* against the captain, with which the assessors apparently sympathized; but on a review of the whole evidence, the Court of Session had no hesitation in coming to the conclusion that the ground of the judgment of the Court below was not well founded, and that no blame attached to the master of that vessel. The practical miscarriage of justice in the inferior Court in this last-named case proved a fatal blow, at least in Scotland, to the conducting of such inquiries before Justices of the Peace. Since that date all inquiries have been conducted before the Sheriff-Substitutes of the respective counties, and happily with the result that more attention has been paid to a due sifting of the evidence by the Court, which has for the most part kept the nautical assessors to their proper duty of advising the Court on questions peculiarly within their province. The result of the *Balmoral Castle* inquiry, how-

ever, shows that unless the Sheriffs continue to show more backbone, and to maintain their true and proper judicial function, they are apt to be led away into false issues and inconsequential results by assessors who, without any special training for judicial business, usurp the province of the judge. It is to be hoped that the Sheriffs, in future inquiries, will not allow themselves to be controlled and extinguished in the discharge of their judicial functions by permitting assessors to travel beyond their proper sphere in the determination of legal points or the construction to be put upon the ascertained facts not affected by purely technical nautical considerations. Mr. Rotherv, the late Wreck Commissioner, appointed under the statute, who had a legal training and long experience in the Admiralty Courts, was always very careful to confine assessors to their proper function, and never permitted them to interrogate the witnesses except upon purely scientific points, and then only by putting the questions through the Court. This system has the double advantage of keeping the inquiry to purely relevant points, and of saving much valuable time. The practice so much in vogue now of allowing assessors to interrogate the witnesses *de novo* on points upon which they have already been fully examined and cross-examined by the parties, is a waste of time, besides being a wholly unnecessary proceeding, which has nothing to recommend it.

LORD KAMES, AND THE REALIZATION OF HIS PROPOSED REFORMS IN SCOTTISH LAW.

It frequently happens that the popular mind ascribes to men prominent in the immediate transaction of great reforms the merit not only of skilfully effecting the changes, but also of their first promulgation. The memory of the people is proverbially short, and it is not unnatural that foremost men of bypast generations should be omitted from their view. Changes in the long settled law of the land, however enticing in prospect, are generally unwelcome at first sight. Resistance to change in many cases comes from the educated portion of a community. The inveterate prejudice of cultivated minds to radical reforms seems somewhat paradoxical, and yet history is replete with instances. It is none the less politic that wise and prudent men should appear as staunch supporters of existing conditions rather than as advocates of the restless spirit of change. To the stability of her laws, and the conservative disposition of her countrymen, Scotland owes much of her pre-eminence. Reverence for law is congenial to Scotsmen. They can also respond with Englishmen to the sentiments of Bacon,—*Nolumus mutari Angliæ leges*. But changes do become necessary. The development of the country, intercourse with other States, and altered habits of the people call for new

measures. Yet it takes a long time effectively to imbue the public with the need for change. The process is silent in its commencement. The statesman who leads the agitation for reform is often forgotten, and in the distant realization of his schemes, laurels due to him are gained by men who owe their fame more to their fortuitous appearance with the maturity of the public mind than to their own genius.

After a long trance of comparative obscurity, there is something of enchantment in the position which Scotland, in proportion to her population, has so rapidly achieved during this century. Commercially she was far behind other continental countries of mediæval times, but in the pursuits of law and philosophy she has for centuries back been full of life and energy. Research and speculative thought are native to her soil. True, the exigencies of the legal profession nowadays leave but little time for the study of the laws and lawyers of former days. Yet it would be surprising to find in how many cases old lawyers could successfully plead the fullest anticipation of the principal changes in Scottish legislation during Queen Victoria's reign, and for the honour in procuring such alterations upon the statute book, the promoters have come in for a larger share perhaps than was their due.

Lord Kames furnishes a strong instance for illustration. Few have been so remarkably abreast of their own day as he afterwards proved. No one was more conscious of this than himself, for in one of his essays he has recorded his belief that the lapse of fifty years after he was gone would gather but scant adherence to many of his views, although he was convinced that time would see their general adoption. To his contemporaries, no doubt, he appeared as an advanced thinker, if not a radical extremist. His endeavours to give judicial effect to his opinions brought him more than once into conflict with his conservative brethren of the bench. Yet in his later years he had the pleasure of noting the Court's unanimous affirmance of equitable doctrines which they had previously rejected on his first proposition of them. The views of this distinguished lawyer appear conspicuously in his treatment of various phases of the feudal law. The system of feus was not indigenous to the country, but no native institution could have taken more permanent hold than it did in Scotland. In the palmy days of feudal principles, as Lord Kames has shown, the country suffered under their baneful influence to such an extent as to impede enterprise. Many of the noxious incidents of feudal tenure, to which he drew attention, are now of antiquarian interest,—such as the freedom of vassals from personal execution for debt, and the immunity of the heir from liability for the ancestor's debts on receiving investiture *de novo* from the overlord. Many inequities were removed in his own day. But it is of importance to consider that Lord Kames strenuously pressed for

liberty to subjects to deal by simple testament with their real estate as freely as with their personal property, and that he zealously pled for the vesting of personal rights in land by the mere survivance of the heir. Yet it was not until 1868 that the law suffered succession to real estate to be settled by the simplest of testamentary writings, nor until 1874 that the highly equitable principle involved in personal rights by survivance received legislative sanction. Both these reforms have proved of incalculable benefit.

In contrast with the simple and effective settlement of a testator's *universitas*, introduced by the Titles to Land Consolidation Act of 1868, the old law, by which heritage was destined *mortis causa*, was not only cumbrous, but it was a relic of barbarism fenced by the strictest technicalities of feudal conveyancing. In dealing with heritage, it was possible for none but the lawyer to make his own will; but now no person with ordinary intelligence is precluded by the former barriers from writing his last disposition with the assurance that his wishes will receive effect. The succession of a larger proportion of the population must now be regulated by the testate directions of the deceased; and it is thought that lawyers are even more widely consulted in the preparation of testamentary writs than use to be the case before 1868. With the experience of nearly two decades such a change has proved to be salutary. The decisions of the Court in interpreting the 20th section of the Act of 1868 have evinced great fairness in giving effect to simple testamentary writings as dispositions of real estate, having in view the infinite variety of words employed by testators in disposing of their means. Effect has been refused only where it was clearly impossible to hold the terms used, by common rules of construction, as embracing heritage. The expenses of realization and division, where no trust is created, are moderate, and delay in winding up testate estates is unusual. It is otherwise in intestate successions. The search for heirs and next of kin frequently entails more or less labour and expense. It cannot be doubted that in the generality of cases it is more satisfactory for parties to declare during their life their intentions as to the disposal of their funds than that this should be left to the operation of law. For want of a testament, an estate may perhaps go to enrich those who are in no need, to the prejudice, say, of the widow, whose legal portion may be inadequate,—such as her husband never intended. Less dissatisfaction can occur when the wishes of the dead are left behind in writing, and excuse can rarely now be open for the want of directions. Lord Kames urged many considerations in favour of subjects dealing with real property as easily and effectively as with personal estate. He cited the law of England, which had allowed land to be dealt with by simple will since the time of Henry the Eighth. But the Scottish lawyers of his day were

inexorably against change. Probably they were averse to assimilation on any point with the law of England, notwithstanding Lord Kames indicated how richly Scotland could repay any advantage derived from England in this respect. The laws, however, of the two countries are now alike on the subject, by virtue of the 20th section of the Act of 1868, which the last Lord Curriehill tersely described as effecting "a silent revolution" in our law.

The 9th section of the Conveyancing Act of 1874, which gave the heir a personal right to land by survivorship of his ancestor, also effected a drastic change in the law of Scotland. Few lawyers would have ventured to predict the desuetude of the time-honoured maxim in Scottish property law—*Nulla sasina, nulla terra*. That a right to land could exist without sasine or infeftment would doubtless have appeared incredible. Yet *nulla sasina, nulla terra* is no more. The law of possession on apparenancy no longer creates harassing difficulties, so common in other days. Indeed, according to Lord President Inglis, possession on apparenancy is now unknown in our law. The principle which underlies the 9th section is eminently fair. It confers on creditors of the heir a firm hold upon his land, should premature death or other cause prevent fendal completion of his title. To creditors of an heir whose personal right has vested by survivorship, it is immaterial whether he possessed as apparent heir for three years from his ancestor's death, or whether they attach his property for his debts during his life or after his death. By the change the interest of the heir is also greatly enhanced. Without a feudal title he can deal *inter vivos* with the estate as he pleases. His unrestricted power of dealing with it may be of moment to him when under urgent call to dispose of it *intuito mortis*. All these considerations were present to the mind of Lord Kames, who saw no reason why the old English brocard—*Mortuus sasis vivum*—should not prevail in Scotland. He aptly describes the English law as one "not more beautiful by its simplicity than by its equity and expediency." England early parted company with feudal notions, and, as his Lordship expressed it, retained nothing but the shadow. To its detriment rather than benefit, Scotland long adhered to both substance and shadow. But the Queen's reign has tolled the knell of departing feudalism so far as substance is concerned. For the shadow, it matters little. Scotland is indebted to the able lawyers who have framed the conveyancing statutes of Victoria's reign, which have been to the country as a charter of emancipation from the servitude of feudalism. These statutes have borne the test of practice well. Lord Kames would certainly have bestowed praise upon their distinguished draftsmen. As in his day, so in ours, many Acts bear the impress of incompetency in their framers. But the enactments under reference have been drawn by masterly hands. Still there is room for further reform in rendering land more easy of transference, with

due regard to security of title. According to Lord Kames, land engages the affection more than personal property, but the land laws seem in need of further improvement before a better demand for real estate is created.

The sagacity of Lord Kames has thus been shown in a pleasing light. Time has verified his predictions that law would again revert to greater simplicity, and that in conveyancing not form but substance would be the criterion, and that another century would not fail to witness the virtual extinction of feudalism and all its attendant anomalies. The well-known views of Lord Kames upon entails might also have been referred to in evidence of his foresight. To tailzies, which he considered as the greatest stain on our jurisprudence, he had the greatest aversion. Parliament has slowly but surely been carrying out his ideas with regard to entails to fruition. A Government return of entailed estates converted by heirs of entail into absolute ownership would be as instructive as it would no doubt be surprising.

Students of the science of law would find further acquaintance with the works of Lord Kames to be interesting and instructive as well as entertaining.

SUNDAY SAILING.

IN a recent article we reviewed the present state of the law with reference to Sabbath observance. The case which we there noticed as in dependence between the Harbour Commissioners of Kirkcaldy and the Galloway Saloon Steamship Company Limited has now been disposed of by Lord Fraser, who has reduced the bye-law of the Commissioners prohibiting passenger traffic upon Sundays, and found and declared that the Steamship Company have right of access to the piers at all reasonable hours upon Sundays, as upon week days, for the purpose of passenger traffic. It has been publicly announced that the Harbour Commissioners do not intend to reclaim against this judgment, which must therefore already have become final. The report of the case has not yet been issued, and therefore we forbear for the present any elaborate comments upon the grounds of judgment. Of the soundness, however, of the result there can, we think, be no doubt, and for that result there is now a very strong consensus of authority, although there is not yet in Scotland any authoritative judgment of the Court. Besides Lord Fraser there is the judgment of Lord Adam, who, as Sheriff of Perthshire, refused to sanction a similar bye-law as being *ultra vires*, and of Lord Watson, who, when consulted in the matter by the authorities in Leith, gave a very strong opinion to the same effect. There is, too, the authority of a similar case in England, where the Court had no difficulty in holding such a bye-law to be *ultra vires* of the managers of a

public canal (*Calder v. The Hebble Navigation Company*, reported in 3 *Railway Cases*). We observe that a similar bye-law has been rescinded by the Forfarshire authorities, in deference to the judgment of Lord Fraser, so there is no immediate prospect of the question being before the Inner House. We shall probably take occasion in a subsequent issue, when we have the opinion and judgment of Lord Fraser before us, of considering the grounds of judgment in this case, which has excited so much interest, more fully. But in the meantime we may point out that the judgment in no way touches the question whether or not it is expedient that local authorities, popularly elected, should have the power of regulating and controlling passenger traffic of this kind upon Sundays. All that has been decided is, that as yet the Legislature has given no such authority to Harbour Commissioners. For the view that such authority should be given there is more to be said than may at first sight appear, and that apart altogether from the question of religious sanction. It seems somewhat hard that whilst all opportunities of refreshment in their own burgh on Sunday should be denied by the State to natives of Kirkcaldy, they should be debarred from securing the compensating quiet by excluding from their piers an influx of strangers, who, as "*bona fide* travellers," have the run of the hotels, and who must cross the Firth for no other purpose than to procure refreshment; for what else could take anybody to Kirkcaldy for pleasure on Sunday passes all comprehension.

THE LOST DIARY; OR, THE "DEVIL'S TEMPTATION."

II.

A BEING of singular, panther-like beauty glided gracefully into the box. Her cold, cruel steel-grey eyes, as she calmly gazed around her, her lithe and sinuous figure, her clear-cut features, and over-bold, relentless look as she turned with a slight smile towards the dock, all at once entranced the attention of the spectators, and caused an almost imperceptible shudder to pass through the crowd.

"That woman's a devil!" said M'Klink to himself; and his heart sank.

Eva, still holding Harry's hand in her own, seemed to cast aside her fear and timidity when this woman entered the witness-box; and she sat gazing at her with eyes in which there burned the fire of pride and indignation, and all the resentment of an outraged wife.

Mr. Hoggan began:—"You are an actress, and twenty-six years of age?"

"I am," replied the witness, in a surprisingly sweet and caressing voice, and with a slight foreign accent.

"That's not the voice that really belongs to such a face," murmured M'Klink again. "The woman's a hypocrite as well as a devil."

"I have known the late Sir Theodore Manners for three years," the lady went on in answer to the questions of the Advocate-Depute. "I first met him at Doncaster during the race week, three years ago last September. Since then he has visited me frequently, both in London and elsewhere.

"I remember the 15th of October last. I have good cause to remember. I was invited by Sir Theodore to drive down with him to visit at his house, Dochie Hall, on that evening. I was acting here in Glasgow at the time, and that night we had dined together before I went to the theatre. It was just a freak. We drove down to Dochie Hall, and found the household had gone to bed, all except Lady Manners, who was sitting writing in her dressing-room.

"Sir Theodore went in to see her, and came out saying that she would receive me there. I went in with him. We talked together for some time."

"What?" asked the old judge incredulously, as he bent forward and cast a searching glance on the glib witness.

"We talked together for some time," replied the lady.

"The whole three of ye?" asked his lordship.

"Yes!"

"Quite pleasantly and affably?"

"Apparently so."

"Vara likely," said the old judge drily. "Go on, Mr. Depute-Advocate."

"What happened next?" asked Mr. Hoggan.

"Lady Manners suggested that we should have some refreshment," replied the witness.

"Well?"

"She got up, went out at the door, and returned with glasses and a decanter. She filled out some brandy in a tumbler, and handed it to her husband, who drank it off. He then exclaimed, 'Good God! You have poisoned me!' threw the tumbler from him, and fell dead on the sofa. The glass hit Lady Manners on the head, and she fell. I screamed. Then the servants came."

"And that is a true account of all that passed?"

"I have sworn it," replied the witness.

"The voice is a little more in keeping with the eyes this time," thought M'Klink.

And then Mr. Blandly buckled on his whole armour, and rose to the cross-examination of this woman, well knowing that the crucial moment had arrived, that all the skill and experience and astuteness of his intellect must now be brought to his aid, for on

that skill and astuteness there hung the life of one of whose innocence every moment was making him more assured.

"Madame La Faltana," he began, "are you married?"

"Yes."

"And your husband is"—

"Dead!"

"Ah! when did he die?"

"There are seven years since."

"You are quite sure he is dead?"

"Quite sure."

"Where did he die?"

"Abroad."

"Where?"

"In Paris."

"And is buried there?"

"What nonsense is this?" cried out La Faltana, in her shrillest tones, her eyes now blazing with excitement. "My husband is dead—dead—dead! It is of no interest here. The question is absur-r-e-d!"

"Witness," said Lord Pittenweem drily, "your *opinion* of the questions is not asked. Your answers to them are all that is necessary."

"Blandly must have something up his sleeve, he is looking so extremely suave and complacent," said M'Klink to his neighbour.

La Faltana, having by this time slightly recovered herself, merely bowed in response to the judge's observation.

"And when did you become an actress?" asked Mr. Blandly in his choicest accents.

"I have been an actress all my life," answered the woman stiffly.

"When you were not engaged in the profession of a spy!" suggested Blandly.

La Faltana paled to the lips. "Sir, you are an insult!" she hissed.

"Not at all, madame," went on Blandly in his most mellow tones. "Tell me, on what terms were you with the late Sir Theodore Manners?"

"I was his friend, that was all," said the woman.

"You were his mistress. Is that not so?"

"If you choose to say so."

"I choose nothing. Is it not so?"

"Well, yes! For me he loved until the end." And she cast her eyes around imperiously at the prisoner, who sat gazing at her with withering contempt.

"Confine yourself to answering my questions," said Mr. Blandly coldly, "and we shall get on very well, I have no doubt;" and he gathered his gown around him with that graceful swing which always boded ill for the peace of mind of the victim who was for the moment under his scalping knife.

"And, such being your relations with the deceased gentleman," he went on, "did you consider yourself justified in accepting his invitation to visit at his house?"

"He invited me!" with a shrug of her shoulders.

"And you went?"

"As you say."

"At the dead of night?"

"After eleven, certainly."

"Knowing that Lady Manners was at home?"

"He certainly told me she was there," replied the woman coldly.

"Did you not consider such conduct an outrage?" cried Mr. Blandly, almost growing warm.

"I consider your question outrageous and impertinent," replied the woman hotly.

"Witness," Lord Pittenweem put in abruptly, "as I tauld ye afore, your opeenion upon the questions is not asked. When Mr. Blandly wants a lesson in manners, he will know where to apply. In the meantime answer what is asked of you, truthfully—if you can." And the old gentleman resumed his writing with a chuckle.

"Now you swear that your account of what passed on the night of the 15th of October is true?" said Mr. Blandly.

"I do," replied the woman unflinchingly.

"Answer me this," said Mr. Blandly, "was Lady Manners writing at her table when you entered the room?"

"She was."

"Then you went in together?"

"No, Sir Theodore went in first, and then came out for me."

"And when you entered, after she had been prepared to receive you, she was still writing?"

"Yes!"

"Is not that rather a curious way of receiving a visitor for whose coming you have been prepared?"

"Perhaps," with another shrug. "Her manner was not of the best, but it is true."

"Now, on what sort of paper was she writing when you first saw her?"

"I know not."

"Was there a water-bottle and a tumbler on the table?"

"I did not see."

"Will you swear there were not?"

"I do not know."

"Is it not the case that you two stole into the room together behind her, without giving her any warning whatever?"

"No, I told you so already."

"Did not Sir Theodore first apprise her of his presence, by knocking her hand from the paper on which she was writing?"

"He tapped her on the arm."

"Did he knock her hand off the paper?"

"He may have done."

"What happened next?"

"I told you. We all sat and talked."

"Quite pleasantly?"

"Quite."

"Is it not the case that, when Lady Manners caught sight of you for the first time, she rose and fled in the direction of the window, pointing at you and addressing her husband in agitated tones?"

"No, a thousand times no! It is false," cried the woman, stamping on the floor.

"That you then rushed towards her, with an open knife in your hand?"

"Lies, lies, all lies!" she hissed through her clenched teeth.

"Is it not then the case that her husband himself produced a flask from his pocket, poured the contents into the tumbler on the table, and tried to drink it,—that Lady Manners rushed forward to prevent his doing so,—that he pushed her from him, and she fell on the hearthstone, striking her head violently on the fender?"

"No, no, again a thousand times no! She has been lying to you!" cried the woman, her lips working convulsively, and her whole being painfully agitated.

"*She* has never been able to say one word about these events from that day to this," responded Mr. Blandly solemnly. "Now, let me finish. Is it not the case that he thereupon drank off the brandy he had poured into the tumbler, and then fell dead on the sofa, dropping the glass as he did so?"

"It is not true," she cried. "I have told the truth. Why should I lie?"

"And so your husband is dead?" asked Mr. Blandly again, seemingly in the most irrelevant manner.

"I have said it!"

"Macer, let Francois Manton be brought in!" cried Mr. Blandly; and in an instant two prison warders appeared at the door, between whom, in convict garb and with manacled wrists, there stood a tall, thin, fierce-looking man, who glared at the witness with wolfish ferocity.

"Who is that?" exclaimed Mr. Blandly triumphantly.

The brave woman looked for one moment at the menacing figure, and then crouching down in abject terror, and stretching out her hands before her averted face, she moaned in a supplicating tone—"Take him away, take him away! He will kill me!"

"Who is that?" inquired Mr. Blandly again, as the warders retired with their prisoner.

"My husband!" said the woman, in a broken voice.

"Now undergoing a sentence of penal servitude for life for complicity in the plots of the dynamitards?"

"Yes!"

"And that man, your husband, was convicted on your evidence?"

"Partly on my evidence," said the woman, with a shudder.

"You don't know, I suppose, that he escaped from a convict prison last September?"

"Escaped! Then I am lost."

"And was recaptured on the 16th of October."

"Thank God!" said the witness faintly.

"A loving, tender, and affectionate wife that," whispered M'Klink.

"What interest have we in this man except to discredit this witness, Mr. Blandly?" asked the judge.

"I intend to call him as a witness for the defence, my lord," answered Blandly.

"Vara good. No more questions of this witness, Mr. Depute-Advocate?"

"None, my lord," said Hoggan gravely.

"Then let the officers detain her in custody in the meantime," said the judge. And Madame La Faltana, a very different-looking person from the malicious and triumphant fiend who had entered the witness-box half-an-hour ago, was led away.

The rest of the evidence for the Crown was more or less formal. A druggist said that Lady Manners had bought prussic acid of him on the day of the death. The doctors swore that Sir Theodore had died from the effects of poisoning by prussic acid; but admitted in cross-examination that, after he had swallowed the fatal draught, he would not have had strength to throw a tumbler across a room with sufficient force to stun any one. The declaration which the prisoner had emitted before a magistrate—our friend the Sheriff-Substitute, who was extremely nervous, and much less pompous in the witness-box than he was when sitting beside M'Klink—merely said, that she remembered nothing whatever of the occurrence. It was proved, however, that at the time of the declaration being made, Lady Manners was suffering from a contused wound in the head, and that she was seemingly in a dazed and stupefied condition. On the ground, therefore, that she could not be said to have been at that time "in her sound and sober senses," the declaration was rejected, and was not received as evidence by the Court.

Francois Manton was the first witness called for the defence.

His hands were unmanacled before he took his stand in the witness-box; but two warders stood guarding him, one on each side, while the police remained on the alert throughout the building.

Every face of all that half-stifed crowd was bent eagerly forward, as the audience endeavoured to catch a glimpse of this notorious criminal.

He was a tall, gaunt, consumptive-looking man, with dark flashing eyes, that glittered at times like two fires. A hectic flush

was on his cheek; his hands were small, with finely tapering fingers; his prison-cropped head was shapely and well formed; and he wore habitually a sarcastic dare-devil expression, with at the same time something fearless and almost noble about it. He stood erect in the witness-box, handsome even in his hideous convict garb, and listened respectfully while the old judge, rising to his feet, adjured him in a few simple, manly sentences to speak the truth. The solemn words of the oath, according to the Scottish form, were then administered, and Lord Pittenweem resumed his seat.

The witness was examined by Mr. Coster.

"Your name is Francois Manton?" said the advocate.

"Yes."

"You are of French extraction, but were educated in America?"

"I was."

"And are now undergoing a period of penal servitude for complicity in a plot to blow up public buildings in this country?"

"Penal servitude for life," replied the convict.

"You saw the witness calling herself Madame La Faltana in the box here, some time ago?" asked the counsel.

"I did," answered the convict, glancing darkly around.

"Who is she?"

"My wife," he replied.

"Maister Coster, if this is all you called this witness for," said the judge, interrupting, "it is not worth while, and is not evidence. It is not pertinent to the issue, unless she made a different statement to him from what she made here."

"Very good, my lord. Then I pass from that," said the advocate hurriedly. "Now," turning again to the witness, "you escaped from confinement in the end of September last, did you not?"

"I did."

"And came to Glasgow?"

"Yes."

"Why?"

"I came to look for my wife. I was anxious to see her," and he smiled grimly and ominously.

"And what did you discover about her?"

"I discovered that she was supposed to be the mistress of Sir Theodore Manners of Dochie Hall, and that she was likely to visit there on the night of the 15th of October."

"And accordingly did you go down there on that night?"

"I did."

"Now just tell us exactly what occurred from the time you went there."

There was a dead hush over all the court as the convict thus went on with his story:—

"I arrived in the grounds a little after eleven o'clock, and made my way towards the Hall. In one window only was there a light burning. I went up to the window; and, as the lower blind was partly open, I stooped down and looked in."

"What did you see there?"

"I saw a room like a lady's boudoir. Opposite the window, beside a writing-table, stood a lady, pouring into a tumbler a few drops of something out of a phial. She then threw the phial into the fireplace, poured a little water into the tumbler, and made as though she were going to drink what she had poured out. She was weeping bitterly."

"Look at that lady in the dock. Is that she?"

"That is the lady."

"Well, go on!"

"She replaced the tumbler on the table at her side, without drinking any of its contents. Then she knelt down, and seemed to pray earnestly. All this time I stood watching and wondering. Then she pulled the table slightly forward, and sat down to write at it. She took out of the table a curious little portfolio, wrote a letter on a separate sheet of paper, folded it, and seemed to be looking about for something."

"What did you think at the time she was looking for?"

"It struck me she was looking for an envelope."

"Did she find one?"

"No. She seemed to think better of it, and slipped the letter into a pocket in the side of the portfolio."

"What next?"

"She then began writing in a book inside the portfolio, when the door behind her was quickly opened, and a gentleman and my wife stole into the room quietly, and stood together behind the lady's chair, smiling and seemingly whispering to each other. Suddenly the gentleman knocked the lady's hand roughly off the paper on which she was writing; and she arose with a scream, and ran over towards the window at which I was standing. She then seemed to be saying something to the gentleman, and pointed haughtily towards my wife; but, as the window was closed, I was unable to hear what passed."

"Well, what happened next?" asked Coster, as the witness paused abruptly.

"What it was she said I do not know; but it seemed to rouse my wife into ungovernable fury. I know her vindictive temper, and was horrified when I saw her rushing towards the lady with, I thought, a knife in her hand. I cried out, and beat upon the window sash with my hands; but it resisted my efforts to open it. My wife stopped in the middle of the room, evidently disconcerted, and the gentleman sprang towards the window. I quickly got out of sight."

"Why?"

"Because I did not wish to be discovered, fearing recapture. I remained in hiding for a few moments, and then crept back again."

"And what did you see then?"

"The lady was still standing, proudly looking down on my wife, who had seated herself on the couch. The gentleman was looking, I thought, rather ashamed of himself, and was speaking soothingly to the lady. She did not appear to answer him."

"What did he do then?"

"He laughed lightly, and said something to my wife, at which she looked up with a scowl at the lady."

"And then?"

"Then he produced a flask from his pocket, looked round as if in search of something, and saw the glass on the table. He did not seem to notice that there was anything in the glass, but quickly poured the contents of the flask into it, and made as though he would drink it."

"What did Lady Manners do then?"

"The lady sprang towards him, and seized him by the arm, as though imploring him not to drink. He looked down at her angrily, and shook her off. She fell heavily on the hearthstone. He then drank off the contents of the glass quickly, and immediately fell back on the sofa, letting the tumbler fall on the floor."

"What next?"

"There seemed to be a wild confusion in the house. Servants came into the room; and, being afraid of discovery, I fled."

"It is not the case that he threw the glass at Lady Manners after he had drunk?"

"It is not. All happened as I have said."

"You were retaken the next day, I think; and are now committed for trial for prison-breaking."

"I am."

Then Mr. Coster sat down, and Mr. Hoggan rose.

"You say that when you first saw Lady Manners, after she had poured out the stuff as you have described, she was writing in a portfolio?" asked the Advocate-Depute.

"Yes."

"Did you see what the portfolio was like?"

"It seemed to me like a small yellow morocco portfolio with clasps."

Then Mr. Hoggan sat down.

"Maister Depute-Advocate," said Lord Pittenweem, "this is really most important. If there was such a portfolio, the police must have found it. It would be handed to the procurator-fiscal, and you should have seen it."

"It is not for me to prove a negative, my lord, I submit," replied the little Advocate-Depute briskly. "Let my friend produce this manuscript and the letter which the prisoner wrote; and

then, I confess, there will be the strongest corroboration of the story of this felon,—evidently, in the meantime, as I shall submit to the jury, concocted for the interested motive of revenge against his wife, and for the purpose of currying favour with the authorities. I never heard of this portfolio or this letter before. They were never forwarded to me. They cannot have vanished into thin air. My own belief is that, except in Mr. Manton's own imagination, they did not and they do not exist."

"Indeed, and indeed they do exist, my lord!" exclaimed the prisoner, as she rose and addressed the bench in thrilling and eager tones. "Every word that this man has said is true; and brings back to me what has left my mind since that awful night. I had wickedly intended to end my own miserable life when he first saw me; and I did write a letter of farewell to my husband, and, not finding an envelope, I put it for the moment into a pocket of the portfolio. My kinsman," she cried impetuously, pointing to Harry by her side, "gave me the book long, long ago. He can tell you that it was exactly as this witness described it. Oh! my lord, this is true. I remember it all now; and you cannot doubt me. I have been wicked and sinful, and sorely punished; but my guilt is not the guilt of a murderer!"

The effect of this touching little appeal was manifest in all the spectators. Even the old judge himself confusedly murmured something about, "Unusual course—hands of your counsel—poor young thing—and I'm a damned old fool," then blew his nose violently, and leant back in his chair. Harry sat in blank despair, as the full horror of the situation burst upon him. The diary, which he had ignorantly thought would be the last link in the chain of proof of his darling's guilt, would really have shown her innocence; and with his own hand he had burnt it! He had ruined his honour, and betrayed his trust for nothing, for less than nothing. In endeavouring to save her life, he had deliberately done the very thing that might destroy it. With an agonized face he leant across the dock, and whispered earnestly for a few moments to Mr. Blandly.

Mr. Blandly looked grave, exceedingly grave and anxious.

"But is this absolutely true?" he said in a low tone to Harry. "Not a mere piece of self-sacrifice for the sake of your relative?"

"As true as that there is a God in heaven," answered Harry solemnly.

"And you have counted the cost of this confession," returned Blandly, not unkindly. "The case for the Crown can hardly succeed now, even without it."

"I must clear *her* good name before the world, even though I ruin my own reputation, professional and social, for ever," replied Harry.

"So be it!" answered Mr. Blandly. Then rising, he addressed the court with dignified courtesy. "My lord, there has

suddenly appeared the evidence which my learned friend so earnestly desires as to the ultimate fate of this portfolio and letter. There are two objections to this evidence being received by the court. The first is, that I have given my learned friend no notice. The second is, that the witness whom I propose to call has been present during the proceedings. I do not for a moment imagine that your lordship will allow either of these objections to prevail in a case such as the present, when the life of the lady, whom I rejoice to call my client, is at stake. I could not give my friend notice, because I have only now learned that the evidence can be forthcoming; and the witness whom I propose to call is Mr. Harry Halkland."

At the mention of our hero's name, an electric thrill seemed to pass through the audience; and a brilliant light suddenly burst upon Mr. Hoggan, as he sat eyeing Halkland with a basilisk glance. "Ha, my young friend," he was saying to himself, "you have deceived me in return for my trust in you. So be it!"

"You can have no objection to this evidence under the circumstances, Mr. Depute-Advocate," said Lord Pittenweem.

"None, my lord," said Mr. Hoggan; and Harry was sworn.

He was pale, but perfectly cool and quiet, knowing, as he well did, that the tale of his voluntary destruction of a production in a murder case must show him as unworthy of the trust of his professional brethren, and perhaps ruin his career for ever,—he yet braced himself for the task before him, and went manfully on with his story. He told how the papers had come into his hands in the course of his professional duty. He described the diary, its form and colour. He explained how he himself possessed one precisely similar. He said that the last entry was under date October 15th, and was unfinished except by a scrawl.

At this moment a commotion was caused in the well of the court, by some one eagerly elbowing his way to the solicitor's table. On looking up, Mr. Hoggan descried among the crowd the well-known features of the faithful Robert, who was wiping his face with a large red cotton handkerchief which he carried in his right hand, while he held out to the Advocate-Depute a strange little packet in his left.

"I found this in among Mr. Halkland's papers in his room this morning," he explained. "I saw 't had something to do wi' the case, and took the first train through."

Mr. Hoggan seized the packet, opened it, looked at it, and then with a smile handed it across to Mr. Blandly, who was at the moment engaged in the examination of Halkland.

"You knew to whom the criminal charge, which it was your duty to advise on that night, referred?" Blandly was saying as he received the packet.

"I knew," replied Halkland sadly.

"And were doubtless agitated about it?"

"I was."

Then Blandly opened the packet, and his face lighted up.

"So much so, I believe," he went on, "that at the moment you inadvertently mislaid the diary which you have just described?"

"I certainly mislaid it," replied poor Harry. "Indeed, I may as well confess—I am very sorry now—more sorry than I can say, but"—

"But," said Mr. Blandly, with a sweet smile, handing to the witness the packet which the faithful Robert, useful for once in his life, had brought with him. "I now show you a portfolio containing a manuscript diary. Is that the document which you mislaid?"

The wonderment of Harry, as he seized on the precious volume, which for weeks he had believed his own hands had destroyed, bereft him entirely of speech. With deep emotion he stood turning over the leaves of that invaluable piece of evidence, whose existence now he knew must save his darling's life and his own honour. Swiftly the true state of the case dawned upon him. He had thrown the wrong diary back among his papers, and burned his own!

"Look at the last entry," said Mr. Blandly, as coolly as though he had intended this *coup* all along, and was accustomed to these scenes every day. "I shall not trouble you to read it. Is it dated October 15th?"

"It is."

"And does it end with a blur or a scrawl?"

"It does."

"Now," said Mr. Blandly, outwardly as calm and cold as ice, but with his heart beating like a steam-hammer, from suppressed excitement, "place your fingers in the pocket at the side of the portfolio, and see if you find anything there."

Harry felt anxiously in the pocket of the portfolio; and his pulses stood still. There was no letter there! Breathlessly he turned it over, and felt the other pocket. Victory!—he drew forth a folded sheet of paper, while a deep sigh of relief arose from the assembled crowd.

"Here it is," said Harry; "a letter in my cousin's handwriting."

"Be good enough to read it aloud," said Mr. Blandly, as serenely as though he knew every word of it by heart.

Harry cleared his throat and drew his hand across his eyes. Then, in trembling tones, he read these words:—

"Theodore, you have done your best to make my life as miserable as you would have it to be. My misery ends to-night. The money you will get by my death is all you ever wanted, when you forced my poor dead mother to give me to you in life. I die to-night, and by my own hand. May God forgive me—and may He forgive you all the wrong you have done me.—Eva."

There was a long silence. Even Lord Pittenweem, who had witnessed many a scene of strange solemnity during the thirty years he had adorned the bench, seemed impressed by the wonderful change in the current of events since he first asked the Advocate-Depute "if he had a case," and sat back in his chair without uttering a syllable.

At length Mr. Hoggan rose in his place, and, turning to the jury, said,—

"Gentlemen of the jury, after the marvellous corroboration of the story of the man Manton, to which you have just listened, there is one course, and one course only, open to me as representing Her Majesty's Advocate. I unreservedly withdraw the case for the Crown, and ask you to return a verdict of not guilty."

"That is the course the court approves," said Lord Pittenweem; to which the chancellor of the jury replied, with that delightful inconsequence which is so characteristic of the "palladium of our liberties":—

"My lord, not one of us believed she had done it ever since we heard her speak."

Then who shall describe the scene that followed? The wild shouts of delight, again and again renewed, without a single word of reproof from the old gentleman on the bench, who even stopped the macers as they called for silence, and sat bowing from his chair as though he had done it all himself. Ready and willing hands undid the fastenings of the gates of the dock, as Harry and the white-haired old solicitor bore the half-fainting form of Eva from the court. Blandly and Hoggan shook hands affectionately—a thing they had not done for years; Mayson insanely slapped our friend the Sheriff-Substitute in the back, and, addressing him in the language of the immortal Mr. Benjamin Allen, asked him, "If he would take anything now, or preferred waiting till dinner-time;" and it is even reported that, in the excitement of the moment, the ubiquitous M'Klink enthusiastically embraced the demure Miss Mary Maxwell, who was joyfully weeping over her young mistress, —though it must be confessed that he always denies this soft impeachment with a twinkle in his eye.

About six months ago, I met Halkland and his wife out at dinner; and they seemed a very happy, correct, and dignified sort of young couple. The bloom of health now glows in her cheek, but her eyes are as large and luminous as of yore, and often turn to her husband with a strange, wistful, and half-troubled expression.

Hoggan is now on the bench; and Harry employs a "devil" of his own. Madame La Faltana is undergoing a richly-deserved sentence of penal servitude for perjury; and her husband recently died in prison from long and lingering consumption. M'Klink, Mayson, and Company still frequent the haunts of the Palace

Street Circuit, and many a time has the story of the Lost Diary been told.

Old Lord Pittenweem was followed to his grave by no more sincere mourner than Harry Halkland, that "brisk young birkie;" and often does he turn to his wife, as she sits beside him at his work, to thank God for the unsuccessful result of the one deceit of his life, when he gave way to "The 'Devil's' Temptation."

LAWYERS AND PARTISANSHIP.¹

THE most notable feature in the discussion of the Charges and Allegations Bill in Parliament, and especially in the House of Commons, is the fact that, leaving the incriminated members out of consideration, it has been emphatically a lawyers' battle. On the side of the Government the conflict has been conducted chiefly by the Home Secretary, who was appointed to his present post because of his success at the Bar, by the Solicitor-General for England, and by the Solicitor-General for Scotland. The most prominent leader of the opposition to this Bill has been Sir William Harcourt, who was one of the legal advisers of the Crown, before he filled the offices of Home Secretary and Chancellor of the Exchequer; while, if not the ablest, certainly the most numerous and most vigorous speeches on the same side have been made by Sir Charles Russell, who has been Attorney-General, and by Mr. Lockwood, Mr. Asquith, Mr. Anderson, and Mr. Reid, who are practising barristers as well as members of Parliament. Mr. Finlay, who among the Liberal Unionists has given most active support to the Government in connection with this measure, is also a distinguished member of the Bar. Even of the followers of Mr. Parnell, Mr. Healy has taken the first place in the debates, and that in virtue of his being an Irish barrister quite as much as on account of his persistent contempt of everything that savours of good taste in Parliamentary utterance. The obvious explanation of the recent preponderance and self-assertion of the legal element in the House of Commons is, that the Charges and Allegations Bill, having for its object the institution of an essentially judicial inquiry, it was very natural that the consideration of its details should be left in the hands of legal experts. It is not less obvious, however, that such an explanation only goes a certain length. It does not account for the remarkable phenomenon of the legal experts who are followers of Mr. Gladstone taking and urging violently one view of the legal points involved in the Bill, and of all the experts who are Conservatives or Liberal Unionists, with

¹ We reproduce this article not as approving of it, but because it seems an expression more able and temperate than is wont of the layman's dislike and distrust of lawyers.—ED. J. of J.

the solitary exception of Mr. Staveley Hill, taking and urging not less forcibly the opposite view.

The chief effects, indeed, of the very heated discussions of the past few weeks upon the lay mind must be to suggest a doubt as to the desirability of there being so many lawyers in Parliament, and to raise the question whether the present close association between partisanship and promotion at the Bar is not somewhat of an anachronism, and even a hindrance to good administration and wise legislation. The popular argument in favour of the existing state of things is easily stated. It is the business of Parliament to make laws; who so fitted then as lawyers to be members of Parliament? The argument is plausible—so plausible as to account mainly for the very large number of barristers who have been returned to the House of Commons, under the recently extended suffrage. It would be convincing as well as plausible, but for the unfortunate circumstance that these barristers are sent to Parliament not as lawyers, but as partisans. Their function in Westminster is not so much to aid their lay colleagues by their special skill in making good laws, as to strengthen the debating power of Conservatism, of Liberal Unionism, or of Gladstonism. The majority of them have attained their professional eminence by their ability as special pleaders; and in Parliament they are expected to be special pleaders still. Yet it may be doubted if there is either a less sincere or a less useful politician than the special pleader in the House of Commons. He too often gives himself up to wrangling, brow-beating, or, at the best, hair-splitting. Not infrequently, as even a hasty glance at the *personnel* of the present House will show, he degenerates into a mere gladiator. The reason for this deterioration or degradation of the lawyer in Parliament is not far to seek. What is his strength as a professional man, becomes his weakness as a politician. He is expected by party etiquette not to put law into politics, but to find law for politics. Not seldom he fulfils these expectations, for his professional conscience comes to his aid. Yet his very success as a political special pleader is generally fatal to any hope of his attaining high standing as a politician in the true and broad sense of the word. It is notorious that our leading statesmen are not men of legal training, but laymen, who are either filled with large ideas or have minds capable of receiving them; and even they obtain such legal aid as they need in giving effect to such ideas, not from partisan lawyers in Parliament, but from non-partisan experts outside, in the shape of draughtsmen. The singular circumstance that the whole of the legal ability on the one side of the House of Commons should have been found ranged on one side in regard to the legal aspects of the Charges and Allegations Bill, and virtually all the legal ability on the other side should have been found taking diametrically the opposite view, must have brought home to the plainest of men the absurdities and the

worse than absurdities of the fashion which virtually compels eminent lawyers on entering Parliament to use their professional skill only in strict subordination to party aims.

A leading, and in some respects, lamentable incident in the debates on the Charges and Allegations Bill is of value as pointing out another evil that is inherent in the etiquette which binds up legal promotion with partisanship. The attempt made to separate Mr. Justice Day as a violent anti-Nationalist from the other members of the Commission which has been appointed under the Bill has, to all appearance, failed in its object of forcing him to resign his position. It is well for the country and for all parties to the controversy which is to form the subject of the inquiry that will be commenced, it is now to be hoped, with the least possible delay, that the Commission which will undertake the inquiry is at once so strong and so free from party bias. It might have been otherwise, and simply because it might have been impossible for Government to find judges at once of such calibre, and with such a colourless record, as Sir James Hannen, Sir John Day, and Sir Archibald Smith. The present political system or fashion encourages, rather than discourages, violence in party feeling, or, at all events, in party language in the case of distinguished lawyers who are ambitious of obtaining seats on the Bench. As a consequence, men, who, from the mere fact of their being absorbed in their professional duties, have had no time to devote to the consideration of the questions that form and divide parties, are called upon to play the rôle of the decided if not fanatical partisan. This work they may perform with energy and even enthusiasm, for they naturally do their best for their party, as they do their best for their private clients. But a time may come when an effort will be made to turn their possibly strong yet essentially forensic utterances against them, just as an attempt was made last week to turn against Mr. Justice Day certain opinions which he is asserted to have expressed in private. And yet it is happily a matter of notoriety that strong partisans make admirable judges and unimpeachably impartial judges. Frequently, indeed, the stronger the partisan the better the judge, and that simply because his partisanship amounted to nothing more than the able assumption of a part which he was compelled to play. It would be better, however, if no such compulsion existed—better not for the judges themselves so much as for the absolute conviction of the public as to their impartiality when called upon to discharge such duties as have fallen to the Commissioners appointed under the Charges and Allegations Act. It must be admitted, at the same time, that it is much easier to demonstrate the desirability of relaxing, if not of destroying, the present close connection between partisanship and legal promotion than to indicate how such a reform is to be carried out. One practical question, however, seems to be suggested by certain

circumstances attendant on—and still more by certain circumstances antecedent to—the discussions on the Charges and Allegations Bill. Is it imperative, is it even for the good of Government on its legislative side, that the legal advisers of the Crown should be Parliamentary partisans, removable according to the fortunes of parties or the whims of constituencies? Could not the duty of advising their colleagues as to the legal aspects of various Bills, which they are supposed to discharge at present, be performed with at least equal efficiency by experts not sitting in Parliament at all, but holding positions analogous to those of the permanent heads and guides of the different Government offices? It is, at all events, becoming as desirable that no suspicion of placing the interests of party above the interests of justice should attach to the law officers of the Crown, as that no such suspicion should attach to judges.—*Economist*.

EVICTION OF RAILWAY PASSENGERS NOT PRODUCING TICKETS.

THE remarkable case of *Butler v. The Manchester, Sheffield, and Lincolnshire Railway Co.*, recently decided by the English Court of Appeal, should not be allowed to pass without special notice. On former occasions (see vol. xv. pp. 1, 16, and other papers there referred to), the effect of railway bye-laws, where passengers refuse or are unable to produce their tickets, or have travelled beyond the authorized station, was fully considered by the light of the decisions up to that time; but in *Butler's* case, so far at least as was necessary to the decision, the validity or effect of bye-laws was not involved. The narrow question was whether, apart from any bye-law in point, the railway company were entitled to eject a passenger who, having lost his ticket, failed to produce it on the ticket-collector's demand; and certainly Lopes, L.J., had good reason for remarking that it was extraordinary that there was no English authority on so important a point. In fact, the only authority the defendant's counsel was enabled to cite in support of the affirmative contention, was the American case of *Shelton v. Lake Shore Ry. Co.* (29 Ohio 216, *cf.* *Kent v. B. & O. Ry. Co.*, 46 *ib.*, 24 Rep. 535). And we may add that the latest American case on the subject to our own knowledge is *Hall v. South Carolina Ry. Co.* (5 S. E. Rep. 623), deciding, last March, that when a passenger cannot obtain a ticket because the office is not open, and is ejected from the train because he will not pay ten cents in excess of the regular fare, and is left at the next station, which is not open, when the weather is rough and uncomfortable, and he might have been put off near his home, he is not confined to his actual damages.

It appears from the report of *Butler's* case in the *Times*, that the plaintiff, who was a wholesale confectioner, took a return ticket from Sheffield to Manchester on the defendants' line of railway by an excursion train at the reduced fare of 2s. 6d. He gave up half the ticket at Manchester, but lost the return half. On arriving at the station before Sheffield, at which tickets were taken, he told the ticket-collector that he had lost the return half, and offered to pay 2s. 6d., the whole amount of the fare. The ticket-collector demanded the full ordinary fare from Manchester to Sheffield of 3s. 5d. The plaintiff declined to pay this; but, although he gave the ticket-collector his name and address, and also a copy of his portrait which he had with him, he was ejected from the carriage by the railway officials, and detained at the station for three-quarters of an hour, until he paid the 3s. 5d. The plaintiff brought an action for assault. The jury found that no more violence than was necessary had been used in ejecting him, and that if he had been wrongly ejected, they assessed the damages at £25. Mr. Justice Manisty gave judgment for the defendants, holding that the action of the company had been within their rights; and an appeal taken by the plaintiff came before Lord Esher, M.R., Lindley and Lopes, L.J.J. "Is not the contract of the railway ticket a licence, which is revocable?" asked Lord Justice Lopes. But it is essentially different. The relation between carrier and passenger is contractual; unlike such a case as *Wood v. Leadbitter* (13 M. & W. 838), where the steward of a racecourse, as occupier of the land, licensed the plaintiff to be admitted to the grand stand, without any contract between the parties, and it was held that payment for a ticket gave no legal right to the holder so as to prevent the steward from revoking the licence at any time and for no cause. The railway ticket is the evidence of the contract; and here one of the terms of the contract, according to the regulations subject to which it was issued, was that the holder should show the ticket. Not having shown it, he committed a breach of contract; but what was to be the consequence of the breach was the question. To eject him, it was argued for the defendants, was the only way of forcing him to show his ticket or pay his fare; and having committed a breach of the contract, he had no longer a right to be carried by the company. But it is not every breach of contract that is so vital as to exonerate the other party from carrying out his own undertaking, though he may have a right of action conferred on him by the breach. To have had such an effect, the non-production of the ticket, the mere evidence of the contract, should at all events have had that consequence attached to it by the contract. But here the regulation neither did that, nor did it say in terms that the passenger committing such a breach might be ejected. "Even assuming," said Lindley, L.J., "that the contract between the plaintiff and the railway company implied the production of the ticket by the plaintiff when it was demanded,

nevertheless the company were not entitled to turn the plaintiff out of their carriage if he did not produce the ticket. Their proper remedy was by action." But they would have taken nothing by action. "The company," said Lopes, L.J., "would have been entitled to take the plaintiff's name and address, and to sue him afterwards for the fare. If they had done so, it was clear that he would have had a good defence, and would have been able to prove that he had paid his fare." On the other hand, as the learned judge added, "the facts showed that the plaintiff was lawfully in the defendants' carriage. That of itself was sufficient to show that the action of the defendants could not be justified. The plaintiff had neither expressly nor impliedly contracted that the defendants should eject him if he did not produce his ticket." So that we may mention the case differed from the Irish one of *McCarthy v. The Dublin, Wicklow, and Wexford Ry. Co.* (Ir. R. 5 C. L. 244), where, in violation of an unquestioned bye-law, a person took his seat without having first paid his fare and obtained a proper ticket, and refused to leave when required so to do, and it was held that the company were justified in removing him, though he had offered to pay the fare when challenged by the company's servants. But, then, it is a reasonable condition to require passengers to procure tickets beforehand: *Hurst v. G. W. Ry. Co.* (19 U. B. N. S. 310); and so it was held last February in the American case of *Brown v. Kansas City Ry. Co.*

Important as was the actual decision arrived at in *Butler's* case, its practical interest is enhanced by the observations of the Court on the question, unnecessary to decide, as to whether a bye-law enabling eviction would be valid. Lord Justice Lindley, indeed, was especially guarded in touching the matter. "The case," he remarked, "was a very important one both for railway companies and for passengers, and he would express no opinion as to whether a bye-law might not be passed which would justify the company in what they had done. But there was no such bye-law in existence." Here, said the learned Master of the Rolls, "the only regulation in the time-table referring to such a case as this was one providing that if a passenger did not produce his ticket, he must pay the fare from the starting-point of the train. It was not necessary now to decide whether that regulation was *ultra vires* or not. There was a decision (*Saunders v. The South-Eastern Ry. Co.*, 5 Q. B. D.) which looked very much like saying that it was *ultra vires* and unreasonable. But it was immaterial to decide that now, since there was no regulation permitting the company to eject a person who had lost his ticket." The uniform code of rules, "Betriebs-Reglement," to which passengers on all the railways of Germany and Austria-Hungary are subject, contains, by the way, a carefully devised ordinance as to enforcing payment, section 14 prescribing that "the passenger who is found without a valid ticket shall, for the whole distance travelled by him (or, if his starting station

cannot forthwith be indisputably established, for the whole distance travelled by the train), pay double the ordinary fare, such payment to be not less than six marks (three gulden of Austrian money = 6s. English). The passenger, however, who enters a train and immediately on entering, without first being challenged, informs the agent or guard that, owing to belating, he has not been able to obtain a ticket, shall (provided always he is allowed to travel, to which he has no right) pay one mark (50 kreuzers of Austrian money) in addition to the fare. Any person refusing immediate payment may be turned out." But the question as to enforcing a penal payment (see vol. xvii. p. 599; *Thom v. Caledonian Ry. Co.*, 24 Scot. L. Rep. 45; *Marshall v. Boston, etc., Ry. Co.*, 2 Mass. (L. ed.) 678, 5 New Eng. Rep. 172; *Charleston v. London Tramways Co.*, Ct. of App., June 2, 1888) is not precisely in *consimili causa* with that which would have been directly presented by such a bye-law as would have met the facts in *Butler's* case. The Irish case of *Barry v. The Midland Great Western of Ir. Ry. Co.* (Ir. R. 1 C. L. 130) might be mentioned as a decision in favour of such a condition as to the payment of the fare; but, at all events, it is a decision further that a breach of such a bye-law would not authorize the company to arrest and detain a passenger as a "transient offender," under 8 and 9 Vict. c. 20, s. 154: and so, see *Chilton v. L. & C. Ry. Co.*, 16 M. & W. 231. But according to the Scottish case of *Menzies v. The Highland Ry. Co.* (15 Sc. L. R. 608), a railway company would have power to "summarily interfere" to remove a passenger travelling on a day for which his ticket was not available, as "a hindrance to them in the use of the railway" under the 102nd section of the Scottish Railways Clauses Consolidation Act, 1845 (corresponding to the 109th of the English Act of the same year); but, according to our recollection, this is at variance with the opinion of Lord Coleridge in the case of *London, Brighton, and South Coast Ry. Co. v. Watson*. It would, therefore, only remain for railway companies to protect themselves by express bye-laws, providing for the ejection of passengers in such cases; yet here, again, they will have to face the antagonistic opinion of Lord Justice Lopes. "There was no bye-law or regulation," said he, "which justified the action of the company, and he, for his part, doubted whether any could be passed which would not be *ultra vires*."

Would such a condition be *ultra vires*, as being "unreasonable"? There is not much guidance on this matter to be derived from any of the cases on the books heretofore; but *Boston & M. Ry. Co. v. Chipman*, which has just been decided by the Supreme Court of Massachusetts, may be mentioned. It turned on the right of a passenger to present a coupon detached from the ticket-book, in payment of his fare. The ticket-book originally contained one hundred such coupons, and on each was printed the words, "Not good if detached," and on the cover of the book, "Coupons

are to be detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by this ticket." The defendant refused to exhibit his ticket-book or to pay his fare in any other manner than as aforesaid. And the Court held that the contract was a reasonable one, and that the company was entitled to judgment. "If by 'unreasonable,'" observes the *Times*, in reference to such a condition as would have applied in *Butler's* case, "it is meant that such a regulation would be inconvenient on public grounds, the proposition seems open to exception. The result of holding such a regulation invalid is that a railway company which has once admitted a passenger into one of its carriages must let him remain there, if he asserts that he has lost his ticket. The inconvenience and the injustice to which railway companies would have to submit, if this extreme consequence of what we may call the contractual theory of the railway ticket is to hold good, are sufficiently obvious. A number of bullies from a racecourse squeeze themselves into a train amid the confusion of the extra traffic, and when challenged to produce their tickets discover, one and all, that their tickets are lost, and that, owing to an unfortunate run of ill-luck, they are unable, even if they were willing, to pay the fare anew. But having posted themselves up in the *obiter dicta*—perhaps by that time something more than *obiter dicta*—of the Court of Appeal, they will point out to the ticket-collector that their tickets were merely the evidence of the contract, that the remedy of the company lies in bringing an action upon the contract, and that all rules and regulations to the contrary are so much waste of printing ink. They will, however, politely proffer their addresses in order to facilitate legal proceedings by the company. When once they were in the train, the company would be bound to carry them as far as the train went, which might be 100 miles or so. We have put an extreme case. But the practice of fraudulent riding in railway trains would beyond a doubt be made easy, and in proportion as it was made easy, it would become common. It may be urged that the companies can, by a previous examination of tickets, insure that no passenger enters a train without a ticket. This very proper and reasonable precaution, however, cannot be taken on occasions of exceptional traffic, except at a cost of great fatigue to the railway staff and great inconvenience to the public." On the other hand, considering that railway companies can readily take that precaution save in such exceptional instances, while in such instances they have the protection of their ordinary bye-laws and right of action against real wrongdoers, why should it be deemed reasonable to arrogate to themselves additional powers of such a summary and arbitrary character? It was on the occasion of just such exceptional traffic as the *Times* adverts to, a rush to a race meeting, that a chairman of the English Midland Railway Co. was a passenger, and found it of little use even to announce

himself a director. "We've had a many of your sort here to-day," replied the ticket-collector dubiously. "I remember," said Lord Justice Lopes, during the argument in *Butler's* case, "losing my ticket when I was travelling as Judge of Assize. I told the man I had the ticket but had lost it, and that I was the Judge of Assize, and the ticket-collector said that he had heard that story before." And the Lord Chancellor of Ireland can bear witness *in propria persona* how difficult it is to persuade a railway official that the keeper of the Great Seal is not a pretender (see the story at large, vol. xx. p. 60). Suppose, it was put to the company's counsel in *Butler's* case, that the collector took the whole of a return ticket on the journey out by mistake: and counsel was coerced to answer that the company could refuse to allow the passenger to return unless he produced the ticket. "Are we reduced to such a state of slavery?" ejaculated Lord Esher. To that complexion would we come, but for such decisions as *Butler v. The Manchester, Sheffield, and Lincolnshire Railway Co.* And compared with consequences so obnoxious, the mischief that may possibly ensue, as the effect of the decision, if a contemporary prove correct in its forecast, would be a minor and endurable evil. "The judgment of the Court in that case," says *Law Notes*, "may be good theoretical law, but it is precious stupid common sense. A company has no right to eject a passenger travelling without a ticket; they must take his name and address, and sue. Dear old judges! Name and address, forsooth! A very correct name and address the company will be likely to get from some fellows. It will be now more than ever requisite for railway inspectors to require the production of tickets; we shall have to show our tickets when going on the platform and at every station; in short, we prophesy that this case will prove in its results a most disastrous case for the travelling public. It will be ticket, sir! here; ticket, sir! there, until the honest public will get thoroughly irritated, and inspectors will have to be paid extra as compensation for black eyes and broken noses. In the interests of the *public*, we hope to see the case reversed by the House of Lords."—*Irish Law Times*.

Reviews.

NEW BOOKS.

THERE is little new in legal literature at present, but we understand that a monumental work is approaching completion at last. The third volume of the *Juridical Styles* will be issued in October. This work has now been some ten years in the press, and its slow progress is but another illustration of the homely proverb about a

superfluity of cooks. We trust, however, that the spoiling amounts to no more than delay, and consequent serving up cold, and the experience of the two earlier volumes goes far to bear out this anticipation. The girth of *Rettie* is a good gauge of the "substance" of the work before the Supreme Court, and we are sorry to observe that this year's volume of these excellent reports is going to be one of the very thinnest on record.

The Month.

WE regret to learn that Lord Craighill, who was absent from the bench nearly the whole of the summer session, is still in very indifferent health.

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It has been found in the Glasgow Sheriff Court, and the Sheriff has affirmed the decision on appeal, that it is not actionable to call a female of the human species a "woman."

* * *

THE Court of Queen's Bench have quashed a decision of a local magistrate, whereby he held that a dog, being an animal *feræ naturæ*, could not be an article of private property, and could not therefore be stolen. Oh, wise magistrate, to find the Court of Queen's Bench such profitable occupation!

* * *

The Fife Hermit.—In the case which has been noised abroad under this title, Sheriff Henderson has found that he has no jurisdiction to interfere with the discretion of the Board of Supervision in insisting upon the application of the workhouse test.

* * *

Lawyers in Hong-Kong.—A firm of solicitors in Hong-Kong write: "A local magistrate of Hong-Kong, who is not a lawyer, and seems to have an antipathy to legal gentlemen appearing before him in the police court, has openly expressed his determination to give his decision, if possible, against the side taking legal assistance. We wonder what he does in any case in which each side is represented."

* * *

Judicial Changes.—For more than two years the story of prospective changes on the Scottish Bench in the immediate future has been regularly served up at intervals of one or two months,

or even less, by a certain section of the London press. The bad taste of the constant repetition of such statements is manifest, but their appearance in society weeklies is not therefore surprising; indeed, the circumstance that they are in bad taste is almost a necessary passport to the columns in which they appear. But it is certainly matter of regret that such impertinences should have found public utterance in the House of Commons. The parliamentary career of Mr. Robert Wallace, member for East Edinburgh, has not hitherto been a glorious one. He stands, we believe, alone amongst Scottish members in the distinction of having been ordered by the Speaker of the House to resume his seat, and on a recent occasion he very narrowly escaped a repetition of this ignominy. In the course of a speech, made towards the close of the session, upon the management of Scottish affairs, this honourable member made an attack upon the present law officers of the Crown, the tone and temper of which, we feel sure, finds no sympathy even amongst those members of the legal profession who are in political accord with Mr. Wallace. In the course of this attack the speaker took occasion to refer to a story, which has gone the round of the society papers, about a supposed "arrangement" to effect certain judicial and legal changes; and he announced that this "arrangement" was completed, and would very shortly be carried out. As to the existence of this alleged "arrangement," Mr. Wallace was very pointedly contradicted by the Lord Advocate,—a contradiction which, however, he only half accepted, notwithstanding the very emphatic manner in which it was given. We need not point out how entirely contrary to good taste and gentlemanly feeling such statements made on such occasions necessarily are. Let alone "arrangements," and be it merely that certain changes are practically settled,—we do not suggest that it is so in the present case,—it is highly improper that a person in the position of a member of Parliament should place public servants in the situation that they must either equivocate or else give unwarrantable publicity and authority to premature announcements with reference to the exercise of the patronage of the Crown. But this is not the worst. It is bad enough that those who, by report, are designated for office should be placed in such embarrassing situations; but the offence is much more serious when viewed in its relation to those whom rumour names as about to make way for others. It is impossible but that these rumours and reports should reach the ears of the venerable public servants with whose names they so freely deal. It is in this aspect that these reiterated statements appear to us the most discreditable. It is unavoidable that both without and within the profession men should take note of the march of time, and it is only natural that a sense of the inevitable changes which time must bring should give rise to speculation and surmise. But such speculation and surmise ought, we think, in all decency, to be

confined to private circles. We believe that we will carry the opinion of the whole of the profession with us in protesting against the attempts which have been made to *chevy* from public life men who have done signal service to the country and the profession, and whose careers have shed lustre upon the bench and bar of Scotland.

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Medico-Legal Congress.—Efforts are being made by the Medico-Legal Society of New York to gather together in that city, in June 1889, an International Congress of Medical Jurisprudence, at which representatives of all countries have been invited to attend or to contribute papers on the subjects to be discussed.

Regarding this proposed International Congress, a circular letter was recently sent by the Medico-Legal Society to all kindred societies in Europe, and to a large number of prominent lawyers and physicians throughout America. This circular set forth the fact that the progress made in America in the sciences of biology, neurology, psychiatry, physiology, psychology, and toxicology have enhanced our knowledge of the functions of brain and nervous organization, and have elevated medico-legal science to a higher rank than it ever occupied before.

The conviction, it is said, has therefore gained ground that medicine and jurisprudence must combine closer for a clearer definition and the better understanding of the principles that are rooted in both branches of learning, in the exercise of functions which require practical application in the government of society. This, it is claimed, is the special field of medico-legal science, and calls for the most intimate relationship between the faculties of medicine and of the law.

* *

BOYCOTTING, it appears, has crossed the Atlantic, for in a recent case the Supreme Court of Appeals in Virginia held that "a conspiracy to boycott is criminal." The case arose out of a trade dispute between labour organizations and a firm of printers. The former boycotted the latter, *i.e.* they endeavoured to crush their business by intimidating others from working for them or dealing with them. The Supreme Court held that a verdict convicting the boycotters of criminal conspiracy must be upheld. As the case was a test one, a fine was imposed.

* *

SCHOOLS—*Authority of teacher—Corporal punishment.*—A pupil having been guilty of insubordination, his teacher, the appellant, after consulting with the township trustee, offered him his choice of a whipping or expulsion. He chose the former, which was

inflicted with a two-pronged switch from a tree, nine sharp blows being received. The pupil made no outcry, and the next morning came back to school as usual without showing any injury. The whipping was painful, and some abrasion of the skin was produced; but there was nothing to show any intentional undue severity or improper motive on the part of the teacher:—*Held*, that the evidence did not justify a conviction of assault and battery. The switch used was not an inappropriate weapon for a boy of Patrick's age of sixteen years and apparent vigour. Patrick's offence, as a breach of good deportment in a school, was not one to be overlooked or treated lightly. It was calculated, and was most likely intended, to humiliate Vanvactor, the teacher, in the presence of his pupils, and its tendency was to impair his influence in the government of his school. The motive was apparently revenge for having been required to stand by the stove for a time, as a punishment for a previous violation of good order. When the alternative of leaving the school or taking a whipping was presented to him, Patrick did not object to it, either as unreasonable or unjust. After consultation and mature deliberation, he decided to accept a whipping, on condition that it be administered privately. In a spirit of evident forbearance, the request thus implied was acceded to. With all these preparations in view, Patrick had no reason to expect that the chastisement would be a merely formal and painless ceremony. The legitimate object of chastisement is to inflict punishment by the pain which it causes as well as the degradation which it implies. It does not therefore necessarily follow that because pain was produced, or that some abrasion of the skin resulted from a switch, a chastisement was either cruel or excessive. When a proper weapon has been used, the character of the chastisement, with reference to any alleged cruelty or excess, must be determined by the nature of the offence, the age, the physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher, keeping in view the presumptions to which we have alluded. All the circumstances lead us to the conclusion that if Vanvactor really gave harder blows than ought to have been given, the error was one of judgment only, and hence not one of improper or unlawful motive. The statement of Patrick that Vanvactor laid on the blows hard, as if he was angry, was, when explained and taken in connection with other evidence as stated, too trivial to materially conflict with the conclusion thus reached. It must be borne in mind that Patrick was not peremptorily required to submit to corporal punishment, but that he accepted that kind of punishment, with all its unpleasant consequences, in preference to a milder and latterly a much more usual and more approved method of enforcing discipline in the schools when grave offences are committed, and that he made no complaint or protest at the time the blows, since complained of, were given.—*Fertich v. Michener*, 111 Ind. 472.

Ind. Sup. Ct., Feb. 9, 1888. *Vanvactor v. State*. Opinion by Niblock, J.—*Albany Law Journal*.

[We heartily endorse this decision, and the comments of our contemporary upon it. The tendency is at present unduly to interfere with the discretion of schoolmasters. No doubt a schoolmaster, like a magistrate, may make a mistake. But it is very unfair that whilst the magistrate who sends an offender to prison for sixty days, where a half-crown fine would have met the requirements of the case, should not be a penny the worse—the schoolmaster who lays it on a little too heavily upon a young rascal's cuticle should be convicted of assault and ruined for life.—ED. J. of J.]

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CRIMINAL LAW—*Adultery—Indictment*.—Under a statute providing that “a man with another man’s wife, or a woman with another woman’s husband, found in bed together, under circumstances affording presumption of an illicit intention, shall each be punished,” etc., an indictment charging that the respondent “being then and there a man,” was found in bed with another man’s wife, “under circumstances affording presumption of an illicit and felonious intention,” is bad for lack of allegation as to what the “illicit intention” was. The rule as to when it is sufficient to charge an offence in the words of the statute was stated in *State v. Higgins*, 53 Vt. 191, being quoted from Mr. Pomeroy, and was thus: “Whether an indictment in the words of a statute is sufficient or not depends on the manner of stating the offence in the statute: if every fact necessary to constitute the offence is charged, or necessarily implied by following the language of the statute, the indictment in the words of the statute is undoubtedly sufficient: otherwise not.” That rule, in substance, has always been the test applied to indictments in this State. Under it this indictment is insufficient. The word “illicit,” as its derivation indicates, means that which is unlawful or forbidden by the law. (*Bouv. Law Dict.*; *Webst. Dict.*) It is not claimed that every illicit intention would warrant a conviction under this statute. It must be a particular lawful intention. Therefore as the indictment stands, all the allegations might be true, and the respondent be not guilty. The illicit intention might have been to steal, burn, or murder, as well as to have unlawful sexual connection.—Vt. Sup. Ct. Feb. 24, 1888. *State v. Miller*. Opinion by Veazey, J.—*Albany Law Journal*.

[There is a refreshing interest in this paragraph. To go back to the very beginning, the statutory provision as to the evidence which is to infer guilt of conjugal infidelity is peculiar. The accused must have been found “in bed” together. The law takes no cognisance of the offence unless it be committed “in bed.” Then to most minds it would have appeared that the

mere fact of a man's being found in bed with his neighbour's wife was sufficient to "afford presumption of an illicit intention." But not so apparently in the eyes of the framer of the statute. There must be other "circumstances" concurring with the common couch ere guilt can be inferred. Again, turning to the indictment, there is a novelty in the description of the accused as having on the occasion of the offence "been then and there a man." In the view of the prosecutor, no doubt, the accused might at some other place or at some other time have been a woman, but that is of no moment, seeing that at the place and time of the alleged offence he was "then and there a man." The decision itself would seem to suggest that even in the new world the recent changes in the criminal procedure in Scotland would appear revolutionary. But the most interesting suggestions of all are those conveyed in the last two sentences of the report—"As the indictment stands, all the allegations might be true and the respondent not guilty. The illicit intention might have been to steal, burn, or murder, as well as to have unlawful sexual connection." Now going to bed with one's neighbour's wife has always been deemed of itself to infer a heinous offence, but hitherto one had no idea of the vast possibilities of crime which such conduct opened up. We presume from the context that stealing, burning, and murdering are cited merely as examples *ex grege*, and that the illicit intention inferred by this conduct might have been any offence known to the criminal law. In this view, a charge taking the form of our old indictments might run somewhat as follows—"Whereas by the laws of this and every well-governed realm an attempt to commit wilful fire-raising is a heinous crime, and severely punishable, yet true it is and of verity, that you the said John Smith are guilty of the said crime, actor or art or part, in so far as on or about the 10th day of August last, in the house number 247 High Street, at present occupied by William Brown, Tailor, you the said John Smith did go to bed with Jessie Spence or Brown, wife of the said William Brown, and this you did with the intention of committing wilful fire-raising." There is here a valuable suggestion for the defence in actions of divorce. Hitherto it has been deemed sufficient to prove that A slept with B's wife, and there remained no other possible defences save lenocinium and condonation. But all this will be changed if we adopt the American suggestion. It will be prudent, however, for the defender to choose some comparatively venial offence as a cloak for the conjugal misconduct. Thus, in answer to an article in the condescendence for the pursuer libelling an act of adultery, we might have—"Answer for the Co-Defender.—Admitted that the co-defender slept with the defender on the occasion libelled. *Quoad ultra denied*. Explained that co-defender went to bed with the defender with the intention of night poaching."]

Divorce Domicile.—A question which has recently been canvassed in the Scottish Courts came up the other day for decision in America, viz., Whether a husband acquiring a domicile in a territory where divorce for desertion is allowed, can at once serve the action, although part of the period of desertion upon which he founds ran its course whilst he and his were domiciled in a territory where no such penalty as divorce was attached to the conjugal offence. The decision was in the affirmative. In the same case it was held that the husband could leave the State of his domicile because he was not satisfied with its laws in reference to divorce, and could settle in another State, because its laws relating thereto suited him.—*Colburn v. Colburn* (Mich.), 14 West. Rep. 906.

* * *

The Responsibility of Licence-Holders for their Servants.—The decision of the Divisional Court in the case of *Bond v. Evans*, noted in this week's Notes of Cases, brings again to the front the conflict in the cases as to the responsibility of a licensed victualler for the acts or sufferances of his servants. *Cundy v. Le Cocq*, 53 Law J. Rep. M. C. 125, although referred to in the judgments, may happily be eliminated from the complication. It was a case in which Mr. Justice Stephen and Mr. Justice Matthew held that a man is drunk so as to make it penal to supply him with liquor when to all appearance he is sober; and although the point was referred to that the word "knowingly" in the earlier statutes was omitted, it was immaterial to the matter then in hand, because the licence-holder was present and knew all that could be known. The question in this case was whether a licence-holder could be made responsible for the act of his servant told off to look after his skittle-alley in allowing gaming. The omission of the word "knowingly" shows that the statute did not require the knowledge to be brought home to the licence-holder personally. The sufferances may be by a servant both in the case of gaming and drunkenness. The difficulty is as to the kind of servant. It has been held as to gaming that it cannot be the potman (*Somerset v. Hart*, 53 Law J. Rep. M. C. 77), but it may be the hall-porter (*Redgate v. Haynes*, 45 Law J. Rep. M. C. 65); and as to supplying liquor, that it can (*Mullins v. Collins*, 43 Law J. Rep. M. C. 67) and cannot (*Newman v. Jones*, 55 Law J. Rep. M. C. 113) be the person in charge of the liquor. The last case was complicated by the fact that the persons charged were trustees of a club and not licence-holders at all, and the charge was for selling without a licence—that is, to non-members. It throws little light on cases of licence-holders who employ servants to conduct the business of supplying the creature wants of all the world. How far the licence-holder is responsible for them is largely a question of fact; but in general the licence-holder is responsible for offences

in regard to matters such as the sale of liquor committed by his servant in charge of the liquors, and for those of his servant having a general charge.

These results would seem to be easily deducible from the words of the Act and the decisions upon it, and to supply tolerably clear and simple tests for deciding the question raised in *Bond v. Evans*, a case stated by justices in regard to their conviction of Bond, under section 17 of the Licensing Act, 1872, for permitting gaming. Bond was the landlord of the "George and Dragon," which had a skittle-alley adjoining. George Owen, a man in Bond's employ, was set to look after the skittle-alley, with instructions that there should be no gambling. On the day in question several men were found in the skittle-alley playing cards for money, with George Owen looking on. It is true that Bond was not there and had no knowledge of what was happening, but the matter was within the jurisdiction which he had conferred on Owen, just as it was within the jurisdiction of the hall-porter in *Redgate v. Haynes*, and not outside the jurisdiction as in the case of the potman, whose duties are ordinarily confined to fetching, carrying, cleaning, and, we believe, ejecting. In *Somerset v. Hart* they included serving, but that fact need not in law turn the scale, and in that case the justices found in the licence-holder's favour. In the present case they found against him, and must be taken to have considered that Owen was a manager. Their decision was entitled to be upheld unless that finding could not be supported in law. It was supported; but, in the course of delivering judgment, the learned judges appeared to treat the matter more as a question of law than it deserves, and to express opinions which seem to call for consideration. Both learned judges lay down that there is some sort of responsibility on the licence-holder for the order of his house which makes him guarantee it. Mr. Justice Manisty, relying on *Cundy v. Le Cocq*, says that the responsibility is thrown on the person who keeps the house. Mr. Justice Stephen, while not attaching much importance to that case, lays down the iron rule that the licensed person must prevent it, otherwise he must be fined. These expressions are an echo of the view laid down in *Cundy v. Le Cocq*, of which Mr. Justice Stephen was the exponent, and in which he said that "the Legislature intended the publican to take the responsibility of the fact whether the customer is drunk or sober." This appeared to be the basis of the decision, and so the question whether the milder view taken in the potman's case, being the later decision, ought not to prevail over the earlier night-porter's case, was thrown in the shade. Mr. Justice Manisty thought that there was a conflict, but Mr. Justice Stephen that there was none. The latter, for the reasons already given, would seem to be right.

This case becomes important from the fact that it appears to carry out the rigid view of the duties of licence-holders laid

down in *Cundy v. Le Cocq*. That view makes the licence-holder an insurer against breaches of the law taking place on his premises. Such a state of the law might be reasonable, but if the Legislature intended it, why did it not say so? It would have been easy to say, "Every licensed person on whose premises the liquor is sold to a drunken person, or a constable on duty, or drunkenness or gaming takes place," and so on, shall be liable to penalties; but the Legislature says, If any licensed person sells liquor to a drunken person, or supplies it to a constable on duty, or permits drunkenness or gaming, and so on, he shall be liable to penalties. No doubt the omission of the word "knowingly," which occurred in similar offences in the older Acts, showed a tendency to strictness, but it is satisfied by making it unnecessary to bring home actual knowledge to the licence-holder; and for the rest, the licence-holder is entitled to have the law under which he holds his somewhat precarious tenure interpreted as penal laws rightly are in favour of the subject, and not to be burdened by a penal responsibility for everything that happens in his house.—*Law Journal*.

* * *

Theft of a Dog.—As noticed above, the Court of Queen's Bench have recently been exercised by the question as to whether a dog can be stolen. Since that note was written, we have stumbled across an interesting judgment upon the very same point, which curiously enough seems to have arisen in America also. The case was that of *State v. Yates*, in the Common Pleas Court, Fayette County, Ohio; and the judgment of Mr. Justice Huggins was in the following terms:—

This cause was heard upon demurrer to the indictment. In substance, the indictment charged that the defendants, in the night season, forcibly broke and entered a stable with intent to steal two dogs of the value of \$40.

The position taken and relied on, in support of the demurrer, is, that dogs cannot be stolen, and that, therefore, a breaking and entering with intent to steal a dog is not burglary. To sustain this position the case of *State v. Lymus*, 26 Ohio St. 400, is cited.

It must be conceded that if no material change has been made in the law of the State upon this matter since Lymus' case was decided, it is directly in point, and settles the question here. It was held in that case, that the Larceny Act of Ohio having defined what could be stolen, by the words "goods and chattels," no larceny could be predicated upon the taking of a dog, because dogs were not "such goods and chattels as were esteemed at the common law to be the subjects of larceny."

The reason generally assigned by common law writers for this rule as to stealing dogs, is the baseness of their nature, and the

fact that they were kept for the mere whim and pleasure of the owners. . . .

This common law rule was extremely technical, and can scarcely be said to have a sound basis. While it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, and to steal many animals of less account than dogs. Lord Coke, in his *Institute*, said: "Of some things that be *feræ naturæ*, being reclaimed, felony may be committed, in respect of their noble and generous nature and courage, serving *ob vitæ solatium* of princes and of noble and generous persons who make them fitter for great employments, as all kinds of falcons and other hawks, if the party that steals them know they be reclaimed." . . . One reason hinted at by Lord Coke for holding that it was not larceny to steal dogs was, that it was not fit that "a person should die for them," and yet those ancient lawgivers thought it not unfit that a person should die for stealing a tame hawk.—Earl, J., in *Mullally v. People*, 86 N.Y. 367.

The faithfulness of the dog is portrayed in nearly every reading book put into the hands of school children. It has been a favourite theme in literature. We read—

"'Tis sweet to hear the watch-dog's honest bark
Bay deep-mouthed welcome as we draw near home."

—*Don Juan*, 1st Canto, 18th Stanza.

"Lo, the poor Indian! whose untutored mind
Sees God in clouds, or hears Him in the wind;

To be content's his natural desire;
He asks no angel's wing, no seraph's lyre,
But thinks, admitted to that equal sky,
His faithful dog shall bear him company."

—*Pope's Essay on Man*.

"The tither was a plowman's collie.

He was a gash and faithfu' tyke
As ever lap a sheugh or dyke;
His honest, sonsie, baws'nt face
Aye got him friends in ilka place."

—*The Two Dogs*—BURNS.

"But the poor dog, in life the firmest friend,
The first to welcome, foremost to defend,
Whose honest heart is still his master's own.
Who labours, fights, lives, breathes for him alone,
Unhonoured falls, unnoticed all his worth."

—*Inscription on the monument of a Newfoundland dog*.—BYRON.

Yet by the common law, and the law of Ohio as declared in *Lymus' case*, if some scoundrel had taken the honest watch-dog, or the poet's firmest friend, *lucris causa* and *animo furandi*, breaking into the mansion-house in the night season for the purpose, no offence would have been committed.

At the highest point of the great St. Bernard pass, eight thousand feet above the sea, and near the line of perpetual snows, is the

hospice of St. Bernard. There, for many ages, pious monks have dwelt, and made it the business of their lives to rescue perishing travellers caught and overwhelmed by the snowstorms of the Alps. They have bred and kept dogs whose natural and trained sagacity in finding and saving persons who, but for them, must have perished miserably, has long made them celebrated the world over. Without doubt, the lives of very many persons have been saved by these dogs. Yet if the pass and hospice of St. Bernard had been in Ohio, when Lymus' case was decided, and some evil-disposed person, maliciously and for the sake of gain, had taken the whole kennel of St. Bernard dogs, no offence would have been committed, and that though storm had been impending and many travellers on the road.

These considerations are not directly in point, but may perhaps be excused because of the somewhat singular nature of the subject. The present question is, Has any change been made in the law of Ohio since Lymus' case was decided, by reason of which it is no longer decisive of this case, and if so, what is such change?

As held in that case, "the property intended to be stolen by the burglar must be property of which a larceny may be committed." At the time that case was decided, as before said, our Larceny Act, in describing property which could be stolen, used the words "goods and chattels." "These words," says the opinion, "at common law have a settled and well-defined meaning, and when used in statutes defining larceny are to be understood as meaning such goods and chattels as were esteemed, at common law, to be the subjects of larceny. As dogs, at the common law, were held not to be the subjects of larceny, they are not included in the words 'goods and chattels.'"

Since that decision our Larceny Act has been revised and re-enacted, and the words now used to describe property that may be stolen are "anything of value." . . . Tested by the definitions of these philosophers (Bouvier, Bastiat, and Walker), a dog has or may have a value. Tested by the common sense of men, and even by the common law, can there be any question that dogs come within the meaning of the phrase, "anything of value"?

As to the utility of dogs, opinions may differ. The flockmaster whose sheep are worried by dogs may have one opinion; the shepherd in the hills of Scotland, whose flocks are herded and tended by his dogs, may have another. There are commodities whose value as represented in money is very great, and which it would be a crime to steal, but which many good people think the world would be better without. Dogs are property, sold and transferred in ordinary business transactions. "Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership they possess all the attributes of other personal property." *Mullally v. People, supra.*

No reason is now apparent why this kind of property should have no protection in the criminal law.

Demurrer overruled.

* * *

RECENT LEGISLATION.—*The Bail Act, and the Parnell Act.*—Two measures of exceptional interest to the legal profession have been added to the Statute Book during the past month, viz. the Bail (Scotland) Act, 1888, and the Members of Parliament (Charges and Allegations) Act, 1888. Neither of these measures is lengthy, and as it may be of interest to readers to have the exact terms before them at once, we print the text of the Acts.

THE BAIL. (SCOTLAND) ACT, 1888.

1. *Short title and application.*—This Act may be cited as the Bail (Scotland) Act, 1888, and shall apply to Scotland only.

2. *All crimes to be bailable except murder and treason.*—The Act passed in the first Parliament of His Majesty King William the Third, intituled "An Act for preventing wrongous imprisonment and undue delay in Trials," so far as the same relates to bail, is hereby repealed, and from and after the passing of this Act all crimes and offences, except murder and treason, shall be bailable, and any magistrate having jurisdiction to try the offence or to commit the accused until liberated in due course of law may henceforth, at his discretion, on the application of any person who has been committed until liberation in due course of law for any crime or offence, except murder or treason, and after opportunity shall have been given to the prosecutor to be heard thereon, admit or refuse to admit such person to bail; and such application shall be disposed of within twenty-four hours after its presentation to the magistrate, failing which the accused shall be forthwith liberated.

3. *Renewal of application for bail, 50 and 51 Vict. c. 35.*—Where bail is refused before commitment until liberation in due course of law on an application made under section eighteen of the Criminal Procedure (Scotland) Act, 1887, the application for bail may be renewed after such commitment.

4. *Statutory limit of bail abolished.*—Any magistrate admitting a person to bail shall fix the bail at such an amount as he may consider sufficient to ensure the appearance of such person to answer at all diets to which he may be cited on the charge, and the Act passed in the thirty-ninth year of His Majesty King George the Third, intituled "An Act to extend the bail to be given in cases of criminal information in that part of Great Britain called Scotland," is hereby repealed, and all other Acts of Parliament, in so far as they limit the amount of bail which may be fixed by any magistrate, are hereby repealed.

5. *Right of appeal to High Court of Justiciary.*—Where an application for bail after commitment until liberation in due course of law is refused by any magistrate, or where the applicant is dissatisfied with the amount of bail fixed, he may appeal to the High Court of Justiciary, and the said Court may, in its discretion, order intimation to the Lord Advocate; and where an application for bail is granted by any magistrate, whether before or after commitment until liberation in due course of law, the Public Prosecutor, if dissatisfied with the decision allowing bail, or with the amount of bail fixed, may appeal in like manner, and the applicant shall not be liberated until the appeal at the instance of such prosecutor is disposed of, except as hereinafter provided: Provided always, that written notice of appeal shall be immediately given by the party appealing to the opposite party, and every appeal shall be disposed of by the said High Court of Justiciary or any Lord Commissioner thereof in court or in chambers after such inquiry and hearing of parties as shall seem just; and in

the event of the appeal of the Public Prosecutor being refused, the Court may award expenses against the appellant.

6. *No fees exigible against accused in respect of application for bail.*—No Clerks' fees, Court fees, or other fees or expenses shall be exigible from, or be awarded against, an accused in respect of his application for bail, or of the appeal of such application to the High Court of Justiciary.

7. *Liberation of applicant when appeal by Public Prosecutor.*—When an appeal is taken at the instance of the Public Prosecutor either against bail being granted or against the amount fixed, the applicant to whom bail has been allowed shall, if the bail fixed shall have been found by him, be liberated after seventy-two hours, or where the place of application is in any island in the Outer Hebrides, or in the Orkney and Shetland islands, ninety-six hours from the time of his application being granted, whether the appeal be disposed of or not, unless the High Court shall grant order for further detaining him in custody pending consideration of the appeal, and notice by telegraph to the gaoler of the issue of such order within the time aforesaid bearing to be sent by the Clerk of Court or the Crown Agent shall be sufficient to justify the applicant's detention until the arrival of such order in due course of post: Provided always, that in computing such period of hours, Sundays, public fasts and public holidays, whether general or Court holidays, shall not be included.

8. *Right of Lord Advocate and Court of Justiciary saved.*—Nothing in this Act contained shall affect the right of the Lord Advocate or the High Court of Justiciary to admit to bail any person charged with any crime or offence.

9. *Interpretation clause.*—The words "crimes" and "offences" shall mean all crimes and offences at common law, as well as all crimes and offences under any existing or future Acts of Parliament. The word "magistrate" shall mean the Sheriff or Sheriff-Substitute, and the words "Public Prosecutor" shall mean "any prosecutor acting for the public interest in the High Court of Justiciary or the Sheriff Court."

10. *Rules for carrying out Act.*—It shall be lawful for the Lords Commissioners of the High Court of Justiciary, and the said Court is hereby required from time to time to make all such rules and regulations, by Act of Adjournal, as may be necessary for carrying out the purposes and accomplishing the objects of this Act: Provided always, that copies of all such Acts of Adjournal shall, within fourteen days of the making thereof, be laid before both Houses of Parliament if Parliament shall be then sitting, and if not, within fourteen days after the commencement of the then next session of Parliament.

11. *Commencement of Act.*—This Act shall come into force on the expiry of one month from the date of the passing thereof (13th August 1888).

THE MEMBERS OF PARLIAMENT (CHARGES AND ALLEGATIONS) ACT, 1888.

WHEREAS charges and allegations have been made against certain Members of Parliament and other persons by the defendants in the course of the proceedings in an action, entitled *O'Donnell versus Walter and another*, and it is expedient that a Special Commission should be appointed to inquire into the truth of those charges and allegations, and should have such powers as may be necessary for the effectual conducting of the inquiry:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. (1.) *Appointment and duties of Special Commissioners.*—The three persons hereinafter mentioned, namely, the Right Honourable Sir James Hannen, the Honourable Sir John Charles Day, and the Honourable Sir Archibald Levin Smith, are hereby appointed Commissioners for the purposes of this Act, and are in this Act referred to as the Commissioners.

(2.) The Commissioners shall inquire into and report upon the charges and allegations made against certain Members of Parliament and other persons in the course of the proceedings in an action entitled *O'Donnell versus Walter* and another.

2. (1.) *Powers of Commissioners.*—The Commissioners shall, for the purposes of the inquiry under this Act, have, in addition to the special powers hereinafter provided, all such powers, rights, and privileges as are vested in Her Majesty's High Court of Justice, or in any judge thereof, on the occasion of any action, including all powers, rights, and privileges in respect of the following matters:—

- (i.) The enforcing the attendance of witnesses and examining them on oath, affirmation, or promise and declaration; and
- (ii.) The compelling the production of documents; and
- (iii.) The punishing persons guilty of contempt; and
- (iv.) The issue of a commission or request to examine witnesses abroad;

and a summons signed by one or more of the Commissioners may be substituted for, and shall be equivalent to, any form of process capable of being issued in any action for enforcing the attendance of witnesses or compelling the production of documents.

(2.) A warrant of committal to prison issued for the purpose of enforcing the powers conferred by this section shall be signed by one or more of the Commissioners, and shall specify the prison to which the offender is to be committed.

(3.) The Commissioners may, if they think fit, order that any document or documents in the possession of any party appearing at the inquiry shall be produced for the inspection of any other such party.

3. *Failure to appear.*—If any person, having been served with a summons under this Act, shall fail to appear according to the tenour of such summons, the Commissioners shall have power to issue a warrant for the arrest of such person.

4. *Punishment for neglect to attend.*—Any person summoned to attend before the said Commissioners who shall refuse, neglect, or fail to attend in pursuance of any summons, shall, notwithstanding the dissolution of the Commission, be liable to punishment for contempt of the High Court of Justice, on the motion of any person who has appeared at the inquiry before such Commissioners.

5. *Committal of a person shall not be affected by dissolution of Commission.*—A warrant or order for the arrest, detention, or imprisonment of a person for contempt of the Commissioners shall, notwithstanding the Special Commission is dissolved or otherwise determined, be and remain as valid and effectual in all respects as if the Special Commission were not so dissolved or otherwise determined, and upon such dissolution or determination all the powers, rights, and privileges of the Commissioners with respect to such warrant or order, and to a person arrested, detained, or imprisoned, or to be arrested, detained, or imprisoned by virtue thereof, shall devolve upon and be exercised by the Queen's Bench Division of the High Court of Justice or a judge thereof; and such contempt, and a proceeding with respect thereto, shall not be in anywise affected by such dissolution or determination of the Special Commission.

6. *Power to appear by counsel.*—The persons implicated in the said charges and allegations, the parties to the said action, and any person authorized by the Commissioners, may appear at the inquiry, and any person so appearing may be represented by counsel or solicitor practising in Great Britain or Ireland. Where it shall appear to the Commissioners that any person affected by any of the said charges or allegations is at any time during the holding of the said inquiry detained or imprisoned, the Commissioners may order the attendance of such person at such inquiry in such manner, for such time, and subject to such conditions as regards bail, or otherwise, as to the Commissioners may seem fit.

7. *Commission may report from time to time.*—The Commissioners shall have power, if they think fit, to make reports from time to time.

8. *Penalty for false swearing.*—Every person who, on examination on oath, affirmation, or promise and declaration under this Act, wilfully gives false evidence, shall be liable to the penalties for perjury.

9. *Power to cross-examine, and examination of witnesses.*—Any person examined as a witness under this Act before the Commissioners, or under a commission to examine witnesses abroad, may be cross-examined on behalf of any other person appearing before the Commissioners. A witness examined under this Act shall not be excused from answering any question put to him on the ground of any privilege or on the ground that the answer thereto may criminate or tend to criminate himself: Provided that no evidence taken under this Act shall be admissible against any person in any civil or criminal proceeding except in the case of a witness accused of having given false evidence in an inquiry under this Act, or of a person accused of having procured, or attempted or conspired to procure, the giving of such evidence.

10. (1.) *Indemnity to witnesses.*—Every person examined as a witness under this Act who, in the opinion of the Commissioners, makes a full and true disclosure touching all the matters in respect of which he is examined, shall be entitled to receive a certificate signed by the Commissioners, stating that the witness has, on his examination, made a full and true disclosure as aforesaid.

(2.) If any civil or criminal proceeding is at any time thereafter instituted against any such witness in respect of any matter touching which he has been so examined, the court having cognizance of the case shall, on proof of the certificate, stay the proceeding, and may in its discretion award to the witness such costs as he may be put to in or by reason of the proceeding: Provided that nothing in this section shall be deemed to apply in the case of proceedings for having given false evidence at an inquiry held under this Act, or of having procured, or attempted or conspired to procure, the giving of such evidence.

11. *Short title.*—This Act may be cited as the Special Commission Act, 1888.

Notes of English, American, and Colonial Cases.

NEGLIGENCE.—*Contributory negligence.*—C. while riding along the road was knocked down by a runaway horse belonging to F., and sued for damages, alleging that the horse was known to be a restive animal, requiring careful management, that it was improperly and negligently harnessed, and wrongfully and negligently allowed to escape from control. The defendant denied the alleged negligence, and pleaded that the accident was due to the plaintiff's own want of care and caution. It appeared that after the horse had been duly harnessed in the ordinary manner, a bolt broke, owing to a latent defect, in consequence of which the shaft became loose, and struck the horse, which became frightened and escaped, and so caused the accident:—*Held*, that it had not been proved that the accident was due either to want of care on the part of the plaintiff, or to negligence on the part of the defendant, or to vicious or mischievous propensities or conduct on the part of the horse, and that in these circumstances the action could not be maintained on the ground either of negligence or of *pauperies*.—*Supreme Court, Griqualand, March 8, 1888.*

INSURANCE.—Disclosure.—Where application asks, "Have you had any medical attendance within the last year prior to this date? If so, for what disease? Give name and address of doctor in full," the answer must state the fact if applicant has had medical attendance within the time specified for any cause.—*United Brethren Mut. Aid Society v. O'Hara* (Pa.), 12 Cent. Rep. 682.

INSURANCE.—Accident.—Where, after a runaway horse was brought under control, the occupant of the carriage was immediately taken sick, and died within an hour, death ensued from bodily injuries effected through external, violent, and accidental means, within an accident insurance policy.—*M'Glinchy v. Fidelity & Casualty Co.* (Me.), 6 New Eng. Rep. 450.

Clause that insurance shall not cover injury of which there is no visible sign on body, does not apply to fatal injuries.—*Ibid.*

CONTRACT OF SALE.—Custom of share market—Time bargain—Tender.—On November 26 P. sold R. certain shares, to be delivered and paid for on or before December 14 at the option of R. Two or three days before this contract it had been agreed at meetings of the local share dealers and brokers that "time bargains" such as the above should be paid on the due date within banking hours, but R. was not a party to this agreement, nor did it appear that he was aware of it. Evidence was led that a custom to the same effect had existed previous to the meetings, but it did not appear to have been uniformly observed, and several brokers denied that it was either general or notorious. December 14 was a Wednesday, on which day the banks closed at twelve o'clock, but the share market was open throughout the day. At 11.45 A.M. on that day the broker, through whom R. had bought the shares, tendered them to him, and demanded payment. R. said he could not then pay, and requested the broker to ascertain the market price. The broker left, and, without again communicating with R., sold the shares on instructions from P. At 3 P.M. R. tendered P. a cheque for the shares, which was refused, and P. now sued him for the difference between the contract price and that at which they were sold. *Held*, that R. was not bound by the alleged custom, and had not broken his contract to pay for the shares on December 14. *Held*, also, that as P. had not objected to R.'s tender on the ground that it was by cheque, and admitted that he would have equally refused cash, he was not entitled at the trial to object to the tender on that ground.—*Palmer v. Rhodes*, *Supreme Court, Grigoland*, February 21, 1888.

PRINCIPAL AND SURETY.—Extending time to principal debtor—Discharge of surety—Case at bar.—It is well settled that a binding agreement between the creditor and the principal debtor to extend the time of payment for a definite period discharges the surety if made without his consent; and where the holder of a promissory note takes a new note from the principal debtor, payable at a future day, without the consent of the surety, the latter is discharged, unless the evidence clearly shows that the parties otherwise intended, and the burden of proof is upon the creditor to show that such an agreement was made. The case at bar is within these principles, and the surety is discharged.—*Stuart v. Lancaster*, *Supreme Court of Appeals, Virginia*, April 21, 1888.

WILL.—Son-in-law—Insane delusion.—Instruction that a son-in-law was not a natural object of testator's bounty, and that if his morbid prejudice against such son did not prevent him from properly appreciating his relations to his daughter, the will cannot therefore be invalidated, is correct; especially where another instruction was given that if an insane delusion towards such son influenced testator's disposition of his property, so far as the daughter was concerned, then the will was invalid.—*Brace v. Black* (Ill.), 14 West. Rep. 671.

SEDUCTION.—On trial for seduction of girl under fifteen years, evidence of presents by defendant to her, before the crime, is admissible.—*People v. Gibbs* (Mich.), 14 West. Rep. 662.

False promise of marriage, under the statute, is not a necessary element in the seduction of a young girl.—*Ibid.*

Instruction that if jury find that girl was of previous chaste character, and that the giving of the promise to buy her a dress was simply one of means employed by defendant to overcome her reluctance, the jury may consider this one of the means employed for the purpose of her seduction, is proper.—*Ibid.*

In determining such question, jury may consider the relation between the parties, and the age of the girl at the time.—*Ibid.*

Illicit intercourse, under promise of compensation, is not seduction.—*Ibid.*

If there has been previous seduction, there can be no conviction, unless reformation is shown; but previous attempts, which were not completed, or attempts consummated by force, do not tend to show that the woman was unchaste at the time.—*Ibid.*

Evidence that at first force as well as strategy was used by defendant in bringing the child within his grasp, is admissible.—*Ibid.*

Evidence of conversation between mother of girl and the girl and her sister, given by mother, explanatory of what was drawn out by counsel for defendant, on cross-examination of child, tending to show that defendant was not absent, as he claimed, at time of occurrence, is admissible.—*Ibid.*

PRINCIPAL AND AGENT.—Broker — Commission.—W. placed certain house property in the hands of M., a broker, for sale. M. introduced K., and obtained for him an order to view the property, which at first he declined to buy, but, about a month afterwards, purchased direct from W. at a price which was substantially the same as that which W. would have received, after deducting M.'s commission, if the sale had originally gone through. M. sued W. for commission, and the magistrate, after hearing the plaintiff's evidence to the above effect, granted absolution from the instance:—*Held*, on appeal, that the evidence disclosed a *prima facie* case, and that the judgment of absolution must therefore be reversed, and the case remitted to the magistrate for further hearing.—*Moir v. Watts*, Supreme Court, Griqualand, May 17, 1888.

CONSPIRACY.—Boycotting.—Evidence that upon the refusal to make a printing office a "union office," a typographical union sent circulars to its customers informing them that they had "boycotted" it, and notifying such customers that they in turn would be "boycotted"

unless they withdrew their patronage from it; that the employees of the printing office and all its customers were denounced in the organ of the union under the head of "black list;" and that the union used every means short of actual physical violence to compel the customers to cease patronizing the office, warrants a conviction for conspiracy.—*Crump v. Com.*, Sup. Ct. App. Va., May 26, 1888.

Instruction that if defendants agreed to compel the office to discharge from its employment certain persons and take into its employment certain other persons, and that if in pursuance thereof they threatened to injure the business of any of its customers, they must find them guilty, is proper.—*Ibid.*

PUBLIC COMPANY.—*Allotment—Clerical Error.*—The defendant company resolved to increase its capital by the issue of new shares offered to the public. Plaintiff, who was a holder of 20 shares, applied for 40 new shares. The directors allotted to the original shareholders new shares to the extent of five-sixths plus one-seventh of their former holdings. The plaintiff was thus entitled to 19 new shares. To another shareholder, holding 35 original shares, 33 new shares were allotted. The Secretary, through a clerical error, in the letter of allotment sent plaintiff, stated 33 new shares had been allotted to him, and to the other shareholder he advised 19 new shares had been allotted. The error was shortly after discovered, and a corrected letter of allotment was sent plaintiff. Plaintiff, however, insisted on receiving the full 33 shares, and sued for their delivery in the Magistrate's Court, where judgment was given against him for all shares over the 19. An appeal against this judgment was dismissed. The plaintiff had not re-sold the shares or suffered any damage or loss through the clerical error.—*East Division Court, Cape Territory*, May 23, 1888.

WITNESS.—*Criminating question.*—Witness cannot be compelled to answer question as to an offence which would criminate him, and is not barred by the Statute of Limitations.—*Ex parte Boscowitz*, Sup. Ct. Ala., May 24, 1888.

But he cannot refuse to answer a question because the answer will humiliate and degrade him.—*Ibid.*

ARCHITECT'S PLANS.—*Liability of carriers—Measure of damages.*—S., an architect at Kimberley, prepared certain plans and specifications for an hospital, in response to an advertisement from an hospital committee at Pretoria, inviting such designs and offering a premium of £25 for those accepted. The designs, which were marked "to be returned," and of which S. had not been able to make copies, were received by G., a carrier, for transmission and delivery, and were lost by him. In an action for damages sustained by the loss, *held*, that the damages were not to be measured by the chance of obtaining the premium offered, but by the value of the time, labour, and skill employed in the preparation of the plans and specifications.—*Stent v. Gibson Bros.*, Supreme Court, Griqualand, May 23, 1888.

HOMICIDE.—Where one person employs a third person to chastise another, without intending serious injury, but the result is death, one who merely overheard the conversation and went along with the parties to see the fight is not guilty of aiding or abetting the homicide.—*People v. Fay* (Mich.), 14 West. Rep. 640.

HUSBAND AND WIFE. — Custody of Children. — Where a wife (applicant) moved upon petition for custody of a child of herself and husband (respondent), and it was shown that, owing to certain differences between husband and wife, a deed of separation had been signed, but no mention of the custody of the child was made therein, but the child had been almost immediately thereafter placed in custody of the husband, and had since been sent to England, under the care of respondent's sister, the Court refused to grant the custody of the child to the wife upon motion, though charges of adultery were made against her husband, and she alleged a verbal agreement to be permitted, at certain intervals, to visit her child.—*Nicholl v. Nicholl, East Division Court, Cape Territory*, December 14, 1887.

HOMICIDE.—The right of self-defence will not avail where defendant voluntarily brings on a quarrel.—*State v. Hardy (Mo.)*, 14 West Rep. 762.

Instruction that although deceased, when intoxicated, was quarrelsome, this fact will not justify his killing by defendant, is not erroneous.—*Ibid.*

Where defendant, after provoking quarrel, prepared himself with deadly weapon, which he used upon deceased when he was completely in his power, the Court did not err in confining instructions to murder in first and second degree.—*Ibid.*

TESTAMENT.—Adoption in Codicil. — A will containing the usual reservatory clause, was signed at the end thereof by the testator and witnesses, but was not signed and witnessed on every leaf, and was consequently invalid. A codicil, purporting to be made under the reservatory clause of the will, was subsequently executed duly attested:—*Held*, that the codicil, by referring to the informally executed will, could not validate it. Query: Whether or not the codicil was valid, standing alone.—*Re Labuschagne, Supreme Court, Cape Colony*, April 12, 1888.

PRINCIPAL AND AGENT.—The acts of an agent in extraordinary emergencies, such as summoning of physician other than one for whom he was sent, will bind his principal.—*Bartlett v. Sparkman (Mo.)*, 14 West Rep. 725.

THEFT.—Evidence — Recent possession.—Where the accused was convicted of theft of a horse which was found in his possession *two years and four months* after the owner had lost it, and it was not proved that he had obtained possession within a year after it was lost, the Court quashed the conviction on the ground that the possession was *not recent*; following *Queen v. Adams*, 3 C. and P. 600.—*Queen v. Stoffel, East Division Court, Cape Territory*, May 29, 1888.

RAPE.—Where connection with girl under age of fourteen is proved to have been obtained by force, it is no defence to show her prior unchastity, although it is a circumstance to be considered by jury in determining the question of consent.—*People v. Crego (Mich.)*, 14 West Rep. 631.

BILLS OF EXCHANGE — Proof of Payment. — A., B., and C. made an arrangement which provided *inter alia* that A. should accept certain three bills of exchange, at one, two, and three years respectively, which he was to give to B., and which were to be held by either B. or C. and not to be negotiated, transferred, or assigned to any third party, A.

undertaking to "pay or provide for" them at maturity. In accordance with this agreement, and on the same day, C. drew the bills to his own order and endorsed them in blank, and A. accepted them and made them payable at C.'s office in London. A. afterwards went to Kimberley, and duly remitted the amount of the first two bills to C. The amount of the third bill he remitted to B. direct, C. having meanwhile become bankrupt. B. afterwards sued A. on the first two bills, which he produced, and A. pleaded payment. His evidence in addition to the above facts was that B. was a money-lender and C.'s father-in-law. He also produced a letter from C., stating that he had with B.'s knowledge kept the amounts remitted to him, and that he hoped B. would return the bills. There was also a letter from B. acknowledging the amount of the third bill, and not containing any reference to the former bills. On these facts the magistrate gave judgment for the plaintiff:—*Held*, on appeal (Solomon, J., *diss.*), that the facts proved raised a sufficient presumption of payment or satisfaction to put the plaintiff on further proof, and that the judgment must therefore be altered to one of absolution from the instance, the question of costs being reserved.—*Myers v. Salim, Supreme Court, Griqualand*, May 3, 1888.

MARRIED WOMAN.—*Debt.*—Coverture is no defence in suit by physician for services rendered to a married woman upon her express promise to pay therefor.—*Elliot v. Gregory* (Ind.), 14 West. Rep. 830.

NEGLIGENCE.—Where intoxicated driver of carriage containing a passenger attempts to pass a toll gate without paying the toll, and the pole is lowered, injuring the passenger, the toll company is not liable, it not appearing that the passenger objected to the conduct of the driver, or that the horses were so near the gate that the act of closing it was so reckless as to manifest a willingness to inflict the injury.—*Brannen v. Kokomo, etc., Gravel Road Co.* (Ind.), 14 West Rep. 837.

LIBEL AND SLANDER.—Words "You are a bitch and a whore. You visit Halfway House, and got your dress there," spoken of an unmarried woman, are actionable *per se*.—*Kelly v. Flaherty* (R.I.), 6 New Eng. Rep. 500.

Such words, without prefatory averments in declaration, cannot be deemed to impute anything more than fornication.—*Ibid.*

SHIPPING.—*Charter party—Cargo.*—Where charterer had option of cancelling charter party if ship was not ready for cargo of "lawful merchandise" on certain day, and was to be notified of such readiness, a notice by him on that day about 3 P.M. of his intention to ship grain, which, though "lawful," was not "general merchandise," and required special preparation of the ship, was not in season; and notice to him on that day that the ship was ready for a cargo of "general merchandise" is sufficient on the part of the ship.—*Greenwell v. Ross*, U.S.C.C., E.D.La., March 26, 1888.

CITIZENSHIP OF CHINESE.—*Habeas Corpus.*—A child born in the United States of Chinese parents is, by the rule of the common law and the fourteenth amendment, a citizen of the United States; and when restrained of its liberty of locomotion therein, may be delivered therefrom, on *habeas corpus*, by the proper national court.—*Ex parte Chin King and Chan San on habeas corpus. Oregon District U.S. Circuit Court*, June 25, 1888.

THE JOURNAL OF JURISPRUDENCE.

THE LIABILITY OF TRUSTEES.

DURING the last few years the personal liability of trustees has been a frequent subject of litigation in the Scottish Courts, and in many cases the decision of the Courts has been adverse to the trustees. It frequently happens that personal liability on the part of trustees emerges as the result of acts or omissions on their part which were apparently innocent at the time. And it is becoming so difficult to get gratuitous trustees to accept office, that it is generally recognised to be inevitable that the Legislature shall further regulate their duties and responsibilities. Legislation in the direction indicated is already beginning to take shape in England, Lord Herschell having introduced into the House of Lords a Bill dealing with certain of the duties and responsibilities of trustees. By far the most important portion of the Bill is that which refers to losses incurred by trustees on loans of trust funds.

As the Bill at present stands, clause 4, sub-clause 1, runs as follows:—

“No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee believed to be an able, practical surveyor, instructed and employed independently of any owner of the property, whether such surveyor carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report. And this section shall apply to a loan upon any property, of any tenure, whether agricultural or house or other property, on which the trustees can lawfully lend.”

The general spirit and intention of the foregoing provision are commendable, and it is highly desirable that a similar provision should be enacted for Scotland. But several difficulties would undoubtedly emerge if the clause were passed into law as it at present stands. In the first place, there is no obligatory direction to a trustee to procure a valuation of the property in the manner stated at the time when the money is to be lent. If it is to be understood that the valuation is to be made at the time, precise expressions ought to be used. If this is not to be understood, then a limit ought to be put to the time within which a valuation shall continue to be reliable as a guide. Most of the losses of trust funds are caused by the fluctuation in the value of property; so that while two-thirds of the value of a property ten years ago might then have been reckoned a good investment, to-day it might prove a very bad one. A certain length of time must necessarily elapse between the date of the valuation and the date of the loan, so that it would be well to fix a period within which a valuation shall be a sufficient guide to a trustee under the statute. Two years would, it is suggested, be a suitable period. The fluctuation in the value of property further suggests a statutory obligation on a trustee to procure at stated intervals, say at intervals of five years between each valuation, a re-valuation of the property. But a greater difficulty is sure to arise in disputes as to the sufficiency of the valuator. All that Lord Herschell's Bill requires is that he shall be "a person whom the trustee believed to be an able, practical surveyor." This is an expression which one would be inclined to think had been expressly framed so as to give rise to dispute. Valuations of property, when they become statutory, ought to be made by persons specially qualified to make them, and licensed as being so qualified. At present, any person who chooses to pay a small annual sum for a licence, as he would for authority to keep a dog or a gun, or use armorial bearings, may set himself up as a "licensed valuator." In what way the qualifications of a valuator are to be determined it is not here suggested, but qualifications they ought to possess; and what these must be, and how they are to be determined, are details of arrangement.

Clause 5, sub-clause 1, of Lord Herschell's Bill supplements the clause which has just been considered. It provides as follows:—

"Where a trustee shall have improperly advanced trust money on a mortgage security which would have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof, with interest."

This is simply an expression of the common law of Scotland on the point. It is suggested, however, that the whole merit of legislation in the lines before indicated would be to render it obligatory for a trustee to procure a valuation in the manner provided, and

to lend to the extent of two-thirds of the amount of such valuation. If he does so, he is freed from personal liability; but if he fails to do so, as a matter of course he becomes liable for any loss of the trust funds that may be sustained.

KANT'S PHILOSOPHY OF LAW.

IN the preface to his admirable translation of Kant's *Rechtslehre*,¹ Mr. Hastie bewails the condition of the science of Jurisprudence in England, if not in Scotland, and advocates a *return to Kant* as the best if not the only remedy. "No other alternative is left for us but a renewed and deepened appeal to the universal principle of Reason as the essential condition of all true progress and certainty. And in the present dearth of philosophical origination, and the presence of the unassimilated products of well-nigh a century of thought, it seems as if the prosecution of this method of all methods can only now be faithfully carried on by a *return to Kant*, and advance through his system." But it is one thing to accept reason as the essential condition of all true progress and certainty,² and to admit with Mr. Hastie the value of Kant's services to law in vindicating its rationality. It is quite another thing to take Kant's system as the starting-point of all future inquiry regarding the general principles of law.

In the following pages we propose to set forth some of the grounds upon which we believe Kant's theory of law to be untenable.³ This theory is so intimately connected with his theory of morals, that, in order to understand the former, acquaintance with the latter is indispensable. We shall commence, accordingly, with a statement of Kant's theory of morals in so far as it bears upon his theory of law.

In the preface to his foundation for a metaphysic of morals, which supplies an introduction to his other ethical works, Kant intimates that the aim of his inquiry is to discover and establish the supreme principle of morality. It is, he says, matter of general agreement that absolute necessity is of the essence of moral law. Moral laws, that is to say, apply always and everywhere; they hold good not for man only but for all rational beings; and consequently their power to bind is not to be derived from the nature of man nor from the world which lies around him. It is to be

¹ Kant's *Philosophy of Law*, trans. by W. Hastie, B.D. 1887.

² We have endeavoured elsewhere to show how law not only secures the existence of man, but also satisfies the requirements of his reason.—*Journal of Jurisprudence*, 1886, vol. xxx. 342; cf. Dahn, *Die Vernunft im Recht*, 1879, pp. 13, 23; *id. Rechtsphil. Studien*, 1883, 116, 117, 299 sqq.

³ See Hegel, *Werke*, i. 335 sqq. Mr. Bradley, in his *Ethical Studies*, 1876, Fourth Essay, has gone over the same ground; but his criticism is confined to Kant's theory of morals.

sought above and beyond experience in the notions of the pure reason. This, then, is the justification of metaphysic of morals.

In his search for this supreme principle, Kant starts from the ordinary man's notion of duty and moral law. There is nothing, he says, which can without qualification be called good except the good will. Mental endowment, excellency of temperament, possession of fortune, health, and position are, in many respects, good and desirable. But if the will be evil, they may become evil and hurtful. And the goodness of the will does not consist in the results which its essence has operated. It remains good, although it may be barren of achievement.

What, then, is the good-will? In order to answer this question, Kant betakes himself to an examination of the current conception of duty.

We say of a man that he acts from inclination, or from duty, or that his action is at once his pleasure and his duty; but we attribute moral quality to an action only when it is done from duty. Thus the moral worth of an action consists not in the results which it has brought about, but in the principle from which it has proceeded. What, then, is the principle of moral action? We are to leave the expected results of the action out of sight, and all principles of action which might have been borrowed from these expected results. True it is, that when we act from inclination we contemplate these results; but it is with the principle of action and not with the results which flow from it that we are concerned in the question of its moral character.

What, then, remains as principle of action? When I act from duty I am conscious that I am subject to law; I recognise its superiority, and consequently I respect it. It is out of respect for it that I act; and I respect it, not because its observance is prudent or pleasant or profitable, but in itself, all other considerations apart. Now to act from respect to law in itself, just because it is law, and from no other motive, is to take universal legality as the principle of action. Could I wish that the principle of my action were a universal law? That is the standard by which to try my action's moral worth; and that is the ordinary man's notion of the meaning of duty.

But from the fact that we have derived our conception of duty from an examination of the ordinary man's notions regarding it, it by no means follows that the conception of duty is derived from experience. It is not with the action but with the principle of the action that duty is concerned; but when a man does what he ought to do, no one can tell whether he acted or did not act from a sense of duty.

Nor can his notion of moral law be derived from experience. For it is quite clear that if it is to be so universal in its application as to include not men only but all rational beings, it must be absolutely necessary. It must, that is to say, admit of no exceptions;

it must hold good under all conditions. For how could we claim universal validity for a law, or how could we demand universal respect for a law, which obtained only in certain circumstances or under certain conditions?

If, then, these moral conceptions cannot be derived from experience, their origin must be sought *a priori* in the reason.

We have already seen that a rational being has his capacity of acting according to principles. But here two possibilities arise. If the law of reason—the moral law—be and be alone the principle of action, then the action, in that its principle conforms to a law which is universally valid, is good. If, however, the moral law be not the sole determining principle,—if the action be, to some extent, expression of “needs and greeds,”—then the agent’s will is not wholly in harmony with the moral law; and the agent, if he have acted as duty directs, has forced his inclinations. In other words, the moral law has asserted itself, and asserted itself successfully.

Now, when we speak of a command, we have in view just such a law as this,—a law, that is to say, which forces the will into agreement with itself. And the expression of such a command we call an *Imperative*.

Imperatives are of two kinds. They are either hypothetical or categorical. Of these, the former kind asserts the necessity of an action as means to something else; it asserts that an action is good in relation to some possible or actual end, *i.e.* under certain conditions only. The latter kind affirms the necessity of an action, looking to it alone, and having no further end in view;—it affirms that an action is good absolutely without any limitations whatever.

But what does the law prescribe? It ordains not this or that specific action, but the form of all good conduct. “Act according to a maxim which can at the same time serve as a universal law” is thus the command formulated in the categorical imperative; and this is the standard by which all rational beings estimate the moral value of their actions.

But the question presents itself,—Why is it that all rational beings do adopt this standard? To answer this question we must enter upon an inquiry into the nature and constitution of the will.

We have seen that men act from various principles, from appetite or inclination, or sense of duty. In other words, they seek to realize these principles in their actions; to realize these principles is the end they have in view. Now assume that there is something, the existence of which has absolute worth in itself; which possesses worth underived from, and independent and irrespective of, everything else. That thing would be the only thing of worth to every man,—the only thing of universal worth,—the only thing, therefore, which could form the content of a categorical impera-

tive. The formula of the command would then be—"always in your actions seek to realize this end."

But the objects of appetite have only a conditional worth. They have worth only so long as the appetite for them endures. And the mindless things of nature have no intrinsic worth; they are of worth only as means to something else. And it is plain that the notion of a thing as of worth to one man only could never serve as a law of universal conduct; for what is worth, not to this man or that, not under this or that condition, but always and to all men, *i.e.* that which is an end in itself, can alone form the basis of such a law.

But every rational being exists as an end in himself; he does not exist as means merely upon which alien wills shall operate. And this is the conception which every rational being *qua* rational being forms of his nature. The practical imperative will therefore be—"act so, that not only in your own person, but in the person of every other human being, you always treat humanity as end, never merely as means."

This imperative is thus at once the law which every man must obey; or, viewed from the standpoint of the individual, it is the end which every man must realize. And so a man's will, in so far as operating to realize this end, is universally legislative. His will is his own, and, at the same time, universally legislative; and where these two sides completely harmonize, the will is autonomous, that is to say, it is determined by nothing other than itself. Each man thus becomes a member in a systematic organization in which the end which each seeks to realize, and the law which each must obey, are one and the same.

But, since this end is universal, *i.e.* is not limited by conditions, it must not be regarded as an end to be realized, else it would be conditioned,—it would hold good only as realized. It must therefore be regarded as negative only; and autonomy must be taken only in the sense that each must act so as not to limit the freedom of others.

Now the will is a sort of causality with which rational beings are endowed; and freedom is the property of that causality, in virtue of which it is self-determining. It contains, that is to say, the spring of its own action. But the notion of causality brings with it the notion of laws, according to which, from something which we call cause, something else, namely, the effect, must follow. Freedom, then, if it is not subject to the laws of nature, and yet is not without law, must be causality governed by law of a special kind. And what can this law be but autonomy, *i.e.* that property in virtue of which the will is a law to itself? But we have seen that autonomy is just the formula of the categorical imperative, just the principle of moral observance; and so a free will and a will under moral laws are identical.

Thus every rational being is conscious of a law of acting, so

that the principle according to which he acts might serve as a universal law of action.

But why should I, and all other beings, *qua* rational beings, submit ourselves to this law? The reason is that there are two standpoints from which every rational being surveys himself and his actions. He regards himself as belonging at once to the world of sense and to the world of intelligence. But since the world of intelligence contains the constitutive principle of the world of sense and of its laws, he must reckon himself as subject to the laws of the world of intelligence. These laws are imperative; and actions, which conform in principle to them, must be regarded as duties.

So it is that categorical imperatives are possible, because the idea of freedom makes me a member of a world of intelligence, and in such a way that, were I that and nothing else, all my actions *would* conform to the autonomy of the will. As it is, I know myself to be, at the same time, a member of the world of sense. Accordingly all my actions *ought* to conform to the autonomy of the will. But all men think themselves free as concerns their will. Therefore in judging an action regard is had to *what ought* to have been done, although it *is not* done. Undoubtedly confusion arises when in speaking of myself as free, I do not mark the fact that I am free only *qua* rational. It is the task of philosophy to show that when we call a man free we are not thinking of him as a portion of the world of sense, as subject to its laws, but as belonging to the world of intelligence; and that these two sides of human life not only *can* quite well stand together, but must be regarded as necessarily united in the same subject.

It is in vain to ask *how* pure reason, apart from all material of the will, from which an interest can be derived, can furnish itself with an interest, *i.e.* a cause determining it to action. We cannot tell *how* it becomes practical. But that freedom is an assumption necessary to the categorical imperative is certain. And so to ask how pure reason can be practical is just to ask how freedom is possible. But freedom is a mere idea: it has no external reality subject to the laws of nature; and, consequently, it cannot be given in any possible experience. The question is therefore unanswerable.

It is on this ground that Kant proceeds to examine the practical, and not the pure practical, reason. Pure practical reason is to be taken as the standard by which to estimate all action. It is the unconditioned determinant, *i.e.* the self-determining determinant, of will. And the task which Kant sets before himself in the *Critique* is to keep the empirically conditioned reason separate from the pure practical reason, so as to ascertain the determinant of the will by way of exclusion.

Now a principle of action which assumes as determinant of will an object of desire, cannot serve as a practical law of universal

validity. In that case the determinant is the conception by the agent (1) of an object, and (2) of himself as gratified in the satisfaction of his desire. The conception of personal gratification must then be taken as condition to the possible determination of the will. But, apart from experience, it is impossible to say of the conception of any object that it is, or that it is not, accompanied by pleasure. The determinant is thus empirical, and can, in every case, hold good for the individual only. All material practical principles—principles, that is, which assume as determinant of will an object of desire—are of one and the same sort, and fall under the principle of self-love or individual happiness. But such a principle can furnish no practical law. It is different in different persons; it is as various as are pleasures and pains; it is individual instead of universal, contingent instead of necessary.

But when a law is considered quite apart from its material—its contents—there remains nothing other than its form. And the simple form of the law, apart from the contents, is a conception; it is not an object of sense; it is therefore not subject to the laws of nature. But such independence is freedom; and, accordingly, a will, whose only law is the simple form, is a free will.

Here, then, we have the sole principle of morality,—in the independence of all material determinants, the will at the same time being determined by the pure form,—that is to say, in the autonomy of the will.

This independence is, however, merely negative freedom; freedom in the positive sense being the self-legislation of the pure practical reason.

Now man is controlled by two sets of laws, by the laws of nature, in so far as he is affected by “needs and greeds,” and by the laws of freedom, in so far as he is above and independent of these empirical conditions. If he act in accordance with the laws of freedom, and if he take them as the sole principle of his action—if, that is to say, he be autonomous—then his action conforms absolutely in principle to the law,—it is wholly *good*. If the action conform, indeed, to the law, but if the principle of the action be something other than the law, his action may be *legal*, but it certainly is not *moral*.

It is essential to every determination of the will by the moral law that it be determined as free will; that it be determined without the co-operation of sensuous impulses, but as discarding all of them, so far as they are contrary to the law. The action of the moral law is therefore negative only. We have thus an eternal conflict between the moral law and our self-centred desires, which are ever striving to arrogate to themselves the position of a law of conduct. In this necessary denial of self-esteem, the moral law humbles, or, viewed from the other side, it arouses a feeling of respect towards itself. And this clearing away of opposition, which is a negative process, may be viewed in truth as positive,

since it secures room for the unimpeded operation of the free will. Thus respect for the law is not so much a motive to morality as it is morality itself treated subjectively as a motive.

The moral stage on which man stands is therefore respect for the moral law. His disposition to conform to the law is not voluntary; it springs from duty. And so his moral position is *virtue*, i.e. moral disposition in conflict, and not *holiness*, i.e. the possession of perfect purity of disposition.

To act morally, then, is to act in conformity with the universal law, taking that law as sole principle of action. In other words, a man to be moral must obey the law, and obey it from a sense of duty; he must make the moral law the maxim, the subjective principle, of his action.

The moral law thus not only imposes an obligation, but prescribes the motive from which the individual must act in performing that obligation. And here it is that morality and legality differ. Each gives the command "do" or "forbear;" but law, indifferent to the motive from which the action proceeds, so long as its command is obeyed, confines its operation to the regulation of external conduct. It prescribes that my action shall conform outwardly to the universal law. And if any action conforms outwardly to the universal law, it will not conflict with the actions of others which are also in conformity with that law. Accordingly the command of law may be expressed thus:—"Act externally in such a manner that the free exercise of thy will may be able to coexist with the freedom of all others according to a universal law."¹ Everything then that hinders freedom, according to universal law, is contrary to law; and accordingly if a given exercise of freedom should operate as a hindrance to freedom, according to universal laws, it is contrary to law. Now compulsion is a hindrance to freedom, and consequently the compulsion which is applied to any given exercise of freedom, which is contrary to law, is itself in harmony with freedom according to universal laws. In other words, this compulsion hinders the hindrance to freedom; and thus law "is accompanied with an implied title or warrant to bring compulsion to bear on any one who may violate it in fact."² Just as we represent the possibility of the free motions of bodies under the law of the equality of action and reaction, so we may regard law, considered solely as such, as "the possibility of a universal reciprocal compulsion in harmony with the freedom of all according to universal laws."³

The result arrived at may be briefly summarized as follows. We saw at the outset that there is nothing which can, without qualification, be called good except the good will; and, in order

¹ Kant's *Phil. of Law*, trans. Hastie, p. 46; Kant's *Werke*, ed. Rosenkranz, 1838, ix. 33.

² Kant's *Phil. of Law*, trans. Hastie, p. 47; Kant, *Werke*, ed. Rosenkranz, ix. 34.

³ *Ibid.*

to answer the question, What is the good will? we proceeded to examine the current conception of the nature of duty. We ascertained that moral quality is attributed to an action only when it is done from a sense of duty, all other considerations apart; and that acting from a sense of duty means acting from respect to law. We found that this law is of universal validity, and that it must therefore be formal; that, in so far as a man makes it the principle of his action, he is free; for he gives expression to that which is universal, absolute, and unconditioned; and that, when his will is in complete harmony with the law, it is autonomous, for while asserting its own validity, it is at the same time universally legislative. We found, also, that action which conforms absolutely in principle to the law is wholly good. The good will then is universal, free, autonomous, and formal. But while morality requires that the action shall conform to the law in principle, legality requires only that the action shall, whatever be its principle, conform outwardly to the law; and, in order to ensure that external correspondence, there is conjoined to legality authority to compel.

Now let us see the working of Kant's theory by means of an example. "A man resolves (*i.e.* adopts as maxim) to augment his income in every secure way. He holds in his hands a deposit entrusted to him by one who has just died intestate; and he proposes to apply his maxim to the sum in his trust. I now put the question, and ask if such maxim would be valid for a law of catholic extent, *i.e.* if his maxim can be announced in the form of a law; and it is directly perceptible that a law ordaining every one to detain sums committed to his trust when he safely can do so is absurd and self-destructory, for it would tend to this issue, that no deposit would at any time be made . . ."¹

Every maxim has a specific character; and the test of the morality of a maxim is its capacity of serving as a universally valid law of conduct. A maxim, which conforms to this standard, remains specific, for it is concerned with a specific class of actions,—with a specific line of conduct; but, at the same time, it holds good as universal law. Of course, if we adopt any one maxim as rule of our conduct, we must reject the maxims which contradict it; and, in order to make our choice, as moral men, we must determine which of these maxims is capable of serving as a law of catholic extent. But whither are we to look for guidance in making this determination? The law itself can tell us nothing. It is a mere form, and, as such, is wholly indifferent. Kant's answer to this difficulty is to be found in the passage quoted above. He says that the maxim, "Augment my income in every secure way," cannot possibly hold good as a universal law, for it involves the proposition that it is justifiable, in the absence of proof of a deposit having been made in my hands, for me to

¹ Kant's *Metaphysic of Ethics*, trans. Semple, 3rd ed., 1871, p. 92; Kant, *Werke*, ed. Rosenkranz, viii. 187.

appropriate the sum deposited. Were such appropriation justifiable, no deposit would ever be made; and, therefore, such a maxim is self-contradictory. But where is the contradiction? It appears only when we look to the consequences of appropriating a deposit. But, surely, it is the law itself which should direct us here, and not our individual judgment as to remote consequences of adopting any specific maxim as law. The very thing we want to know—our sole difficulty as moral men—is whether it is *this* specific maxim that must be affirmed as law universal, or a maxim which contradicts it. But, according to this theory, we must make our selections before the universal law can operate; but, so soon as we have made our selection, the operation of the universal law is superfluous. We are to be guided to our decision by what appears to us “directly perceptible;” and when we have decided what is moral, we have no need of the law to help us.

But the universal law is not merely superfluous; it is contrary to reason.

We have seen that every maxim has a specific character; and that the test of the morality of a maxim is its capacity of serving as a universal law of conduct. The problem is how to make the maxim universal without destroying its specific character. Now it is plain that the specific cannot be made universal. A specific thing is only specific because it is “this” and not “that.” It is of the essence of every specific thing to be contrasted with, opposed to, limited and defined by other specific things; and to transform it into a universal is to contradict its very nature,—is, therefore, contrary to reason. But, further, were it possible to effect such a transformation, its effect would be to deny to the universal law any field for its operation.

The maxim then can only be made universal by preserving its specific character, but investing that specific character with a universal form. Accordingly the maxim and the universal law are absolutely identical in form, but the maxim retains its specific character. And if we express this unity of maxim and law in the form of a proposition, what does the proposition express? A mere tautology. Take the maxim, “Augment my income in every secure way,” and assume for the moment that it is “directly perceptible,” that it is capable of serving as law universal. You then give it a moral character by investing it with a universal form. All that results is that what you have invested with universality is universal,—that if you give “Augment my income in every secure way” a universal form, it holds good as universal law. And so would any other maxim which you chose to treat similarly. We are thus free to pick and choose among maxims, and give any one of them we may select a moral character by putting it into the form of a tautology. And the principle according to which we make our selection, is not the universal law, but the more familiar principle of likes and dislikes.

This process of moralizing is beset with other difficulties. Assume that the specific nature of the maxim is not affirmative but negative. For example, in the maxim "relieve the poor," negation of "the poor" is the specific character of the maxim. If this maxim is to be regarded as moral it must hold good universally; and its command must be obeyed and carried out into practice universally. But if this maxim held good universally, it would be self-contradictory. For if the law say that the poor shall be relieved universally, there are either no poor or none but poor, and none to relieve. If "the poor" remain, the possibility of relief remains; but what the law prescribes must be performed; and so duty can only be fulfilled when its commands are disobeyed.

Thus we finish as we started with the insuperable contradiction between universal and particular,—between form and content,—between the law to be applied and the specific cases for its application. Law and maxim may be formally identified—they may constitute a unity in form, but we cannot carry over the identity—the unity—from the form to the content. And this contradiction must, from the very nature of the process of moralizing, be always present to the formal unity.

Kant recognises that to be the guiding principle of conduct constitutes the moral significance of duty, and that to take duty, and duty alone, as his principle of action constitutes the moral significance of man. But, while he regards this union as the true essence of morality, he, at the same time, asserts the independence and self-subsistence of each of the two elements united,—of the universal freedom of all and of individual freedom.

Upon the separation of these elements Kant's theory of law is founded; and to law is assigned the mission of bringing together these elements,—the universal will and the individual will,—so that the former shall be the reality and truth of the latter. The rule of the universal will in the individual, however, is to be regarded not as that of a sovereign presence, dwelling within the individual and inspiring his actions, but as something produced from without, and produced by compulsion.

Here, then, we have an opposition. On the one side, we have the universal freedom of all; on the other side, we have individual freedom; and each side is regarded as having an independent value. Individual freedom is to be brought into accordance with universal freedom—the particular, that is to say, is to be made universal—by the operation of compulsion.

It is plain enough that universal freedom considered apart from individual freedom, and individual freedom considered apart from universal freedom, are mere abstractions. But putting that aside, observe what is the real nature of freedom and of compulsion. It is of the very essence of freedom that there be nothing external to it. But power to compel must always be external to the thing

compelled. And, accordingly, freedom cannot be brought about by compulsion. Further, compulsion is restricted in the sphere of its operation. Its operation is permissible only so long as the freedom of all is thereby secured. Accordingly, it is not absolute, not universal. And it is said that the freedom of each ought to be limited in order to secure the freedom of all. But what is limitable is not absolute,—is not universal. And thus it is self-contradictory to talk of making the individual will harmonize with the universal will by means of compulsion; for the statement is equivalent to an assertion that it is possible to make what is not absolute (the individual will) absolute (universal will) by means of something not absolute (compulsion).

In the preceding pages we have endeavoured to indicate the insufficiency of Kant's theory of law and morals. The moral law can operate only after we have decided what is moral. It is, therefore, superfluous, and its applicability is determined by the exercise of mere caprice. And, further, to apply it is either impossible or useless; for if we seek to moralize our particular maxim by making it universal, we either transform a particular into a universal, and, thereby, subvert its nature, or we produce a tautology. Kant's theory of law rests on the assumption of an opposition, to each side of which he assigns a real and independent existence. These he seeks to bring together, so that universal freedom shall be secured; and the means which he selects for this purpose presupposes for its existence the denial of freedom.

According to this theory law is founded on morals, but the relation of law to morals is purely negative. It seeks, as morality seeks, to secure universal freedom; but while morality looks to the disposition, law concerns itself only with the externals of conduct. Law and morality are thus regarded as spheres distinct and mutually exclusive, and not as spheres included, together with other spheres, within the larger circle of social relations. Law and morality alike prescribe obedience to a universal rule of conduct; but all that we know of this rule is that it is a mere form, and that it cannot be obeyed; for a mere form is an abstraction, and to realize an abstraction is impossible.

Man is no mere animal, but, nevertheless, he is an animal; it is the task of law at once to secure his existence, and to satisfy his reason; and if we desire to know what law is, we must turn to the history of society, and ascertain what has been the course of human wants, criminal and rational. The philosophy of law may well take to heart Helena's advice to Eupharon, and thereby avoid his fate:

" . . . In der Erde liegt die Schnellkraft. Die dich aufwärts treibt; berühre mit der Zehe nur den Boden, Wie der Erdensohn Autäns bist du alsobald gestärkt."

P. J. HAMILTON GRIERSON.

THE MOTHER'S RIGHT OF CUSTODY, AT COMMON LAW, AND UNDER THE GUARDIANSHIP OF INFANTS ACT, 1886.

It forms an interesting study in the evolution of legal ideas, to compare the first principles at the foundation of any system of jurisprudence with the actually existing state of the law. But rarely is it found that the superstructure harmonizes with the foundation: in most instances the influence of the first principles is barely recognisable in the elaborate details of the existing system. To the trained legal mind, however, a recurrence to first principles is inevitable and indispensable; they are like the permanent way of a railroad—the real guiding lines throughout any department of legal inquiry. The rights of the husband and the father are cases in point; it is enough to mention them to suggest the fundamental ideas of the *manus* and the *patria potestas*, which are at the root of all family relations. It is from that simple system where mother and child are equal *inter se*, and without rights as against the father, that legal ideas respecting family relations must start. Yet there is no more similarity between the omnipotence of the primitive paterfamilias over his domestic chattels—his wife and children *sub manu*—and the powers of the modern husband and father, than there is between the age of rude energy which environed the former, and which was reflected in the symbol of power, the man's right-hand, and the complicated civilisation in which it is the lot of the latter to pass his days. The movement for the emancipation of the wife is a long and chequered story, which is by no means all told in the evidence of legal enactments; and it is now merged in the much wider questions which are being discussed under the notorious category of the Rights of Women. In a highly artificial state of society it is sure to prove a difficult problem how to preserve intact the institution of the family, on which the health of society depends, and a quite peculiar interest therefore attaches to attempts by the Legislature to regulate family relations. Quite recently the husband and wife have been placed on what is almost a footing of equality in regard to patrimonial matters, and it was a natural consequence of this that the powers of the father and mother over their children should be approximated more closely than they are at common law.

The Guardianship of Infants Act of 1886 came to Scotland in something of a foreign garb: it is an English Act whose application includes Scotland. Its name intimates as much. And whereas the common law of the two kingdoms differs considerably, it was a matter of doubt in some quarters whether this new statute made any material alteration on the law of Scotland so far as concerns the parents' rights of custody and access to their children. It will

require further judicial decisions besides those already made under the Act, to determine the precise extent and nature of the alterations which it has introduced. That the Act has materially improved the position of the mother, in relation to custody and access, appears certain.

By the common law of Scotland, the father, while living and sane, has a completely established right of the custody to his legitimate child; it is a right against all comers, the mother included. The only exceptions which the Court will make are based on the interests of the child, not on any right of the mother competing with that of the father. If the child be not weaned, its physical health can ordinarily be best secured by leaving it with the mother; and if the father be unfit to regulate the life and upbringing of his offspring, the mother will be preferred to a third party as the most likely person to watch with solicitude over its moral well-being. The mother, however, is not wholly without legal recognition as a natural custodian of her children, for, if the father be dead or insane,—if the shadow of the *dignior persona* which obscures her own be removed,—she becomes entitled to the right of custody, at least while the child is very young, certainly up to the age of seven, even against tutors-nominate of the father, subject, however, to their superintendence in such matters as education. This rule is truly a recognition of a right in the maternal *persona*, and not merely a regulation adopted because likely to be for the child's benefit. Lord Mackenzie once said of it that it had "been established for two reasons—1st, for the sake of the children, the mother having stronger affection for them than any one else can have; and 2nd, for the sake of the mother herself, that she might satisfy her anxiety, and generate those filial affections in the children which absence is apt to prevent." The inferior character of the mother's right, however, as compared with that of the father, is evidenced by the jealousy with which the Court regards any attempt by her to remove the child out of the jurisdiction.

But there is one striking modification of the father's general right of custody admitted by the common law of Scotland, which is ignored by that of England, viz. the right of access which belongs to a mother who has lost participation in the custody and society of her child. This right, unknown to the common law of England, was conferred on English mothers by statute 2 and 3 Vict. c. 54. The right can be forfeited if the mother's conduct has been such as to place her entirely in the wrong, but it is not always a good answer by the husband that he is willing to receive his wife again, even though the wife of her own motion left his house without raising any proceedings against him. The access should be free and at all reasonable times, but the unwillingness of the Court to interfere intensifies in proportion as the justification of the wife's position becomes more slender, or as the likelihood of the parties coming together becomes stronger.

The rules of the common law are, of course, subject to modification in the interests of the child, which always form the prime consideration. Only too often where a family has failed to live harmoniously, the guardianship or conversation of the one parent or of the other is likely to be injurious, and has to be shunned. Considerations of this kind are applied much more strictly against the mother than against the father, so that it has always been very difficult, *stante matrimonio*, even for an aggrieved and innocent wife to get herself preferred as custodian, to a husband who is not absolutely unfit. In the cases of separation *a mensa et thoro*, and divorce, on the other hand, although at common law a guilty father does not lose his right of custody, the Court exercised a wide discretion even before the passing of the Conjugal Rights Act of 1861, under which statute it is the invariable practice to commit the children to the care of the innocent party.

Throughout these rules of the common law regulating the custody of the children, there runs a clear and strong preference in favour of the father as custodian. Little else remains to him of his exclusive right of custody as *pater familias*. It is this preference which the Guardianship of Infants Act of 1886, and more particularly sec. 5 thereof, assails. To what extent the preference can be said to remain is, in the light of the decided cases, very difficult, if not impossible, to determine. If sec. 5 be read without reference to the common law, and as containing the law of Scotland on the subject of custody, the husband and wife would appear, as such, to have perfectly equal claims; but, unless the common law is expressly repealed, it—according to a commonly received doctrine—continues operative so far as not directly inconsistent with the statute. Where the Court is empowered—as in sec. 5—to make “such order as it may think fit,” regard being had to certain expressed considerations, there seems every reason to understand that the old common law rules will be used to assist the Court in determining what it shall consider to be “fit.” On the other hand, the interpretation which was put upon the 9th section of the Conjugal Rights Act of 1861 (empowering the Court to make such interim orders and final provision “as to it shall seem just and proper” with respect to the custody of the children) by Lord Benholme in the case of *Lang*, viz. that the section gave no wider powers than those of the common law, was upset by Lord Cairnes’ declaration in *Symington* that the Act had given the Court a completely unfettered discretion. The most difficult cases are those arising *stante matrimonio*; and with regard to them it is impossible to say more than that the mother, besides getting her right of access regulated by the Court, can now obtain at least a share of the custody of her children without the necessity of proving unfitness against the father. In cases which depend so much on the

peculiar circumstances in each, it is, perhaps, never safe to attempt a general statement of what the wife's case must amount to, to enable her to succeed,—*fraus lata in generalibus*,—but the difficulty in this instance is greatly augmented by the form of the new statute, and the hesitation—not to say the ambiguity—of the decision in the leading case.

It is not often that so good an opportunity of comparing the state of the law before and after the passing of a new statute is presented to a Court of law, as in the recent case of *Mackenzie*. This case was before the Court first in 1881, and the proceedings which took place at that time are reported in 8 R. 574 and 18 S. L. R. 379. It cropped up again twice in 1887; and the further stages of the case which were then carried through are reported in 25 S. L. R. 183 *et seq.* Unfortunately for the more precise elucidation of the effect of the 5th section of the new Act, the case is of a kind in which the Court is always inclined to leave as much to the parties themselves as possible, and to restrict its interference to the minimum; and this judicious moderation, combined with a certain form of judicial prudence, which shirks the laying down of general principles whenever the point at issue can be decided on narrower grounds, appears to have prevented the Second Division of the Court from throwing as broad a light on the *terra incognita* of the new enactment as it would otherwise have done. The facts of the case as presented to the Court in 1881 were briefly as follows:—After three years of married life, during which one child, a girl, was born, the parties had so far failed to agree that the wife left her husband. The joint establishment was thereafter broken up, and the husband went to reside in his mother's house, while the wife, residing in the neighbourhood, was permitted to see her child at the house of her mother-in-law on fixed occasions, but only on condition that her interviews with the child were to be in the presence of a servant or relation of the husband, and that no person was to accompany the wife on her visits. The husband was willing, and offered, to receive her as his wife again in his mother's house, but this offer remained unaccepted by the wife. The exact nature of the differences which led to the separation was not disclosed, but neither party attributed them to any defect in the character of the other; and it appears from the report that the wife's refusal to resume cohabitation was subject to the husband's answer to her demand that if she went back to live in her mother-in-law's house she should be mistress of it. A curious question arises here. After the breaking up of the joint establishment, the husband had no house of his own. Was it a sufficient offer, under the common law, to receive the wife in the house of his mother? Apparently, as will appear from the sequel, it was. The prayer of the petition was for regulation of the mother's right of access; in particular, it asked that her interviews with the child should be held without

the presence of a representative of the husband, and partly in her own—the wife's—residence. The petition was refused, and that for the reason that the wife did not show that she had lost the society of her child without fault of her own. Lord Young said: "In the absence of evidence to the contrary, we must assume that her absence from her husband is not legally warranted. In another than a legal point of view, there may be more or less of excuse for her, but legally—and we must regard her conduct from the legal point of view—she is not doing her duty in living apart from her husband and child . . . She has been invited to come and live in her mother-in-law's house, but declines to do so unless she is to be the mistress of the house. We consider that demand not legally warranted. . . . We know of no authority empowering a wife so deserting her husband and child to apply to the Court for access to the child." The last sentence sums up the application of the common law to the circumstances of the case.

When the case next came before the Court, in 1887, the Guardianship of Infants Act was in operation; and the new petition was presented under sec. 5 of that Act. The state of the facts was as follows:—The access allowed to the mother at the date of the first application had been considerably restricted, and various attempts at reconciliation between the parties had ended in failure, owing to certain stipulations insisted on by the husband relative to household arrangements, and to the wife's visits to her friends. The petition prayed for a finding in terms of sec. 5, that the mother was entitled to free access, and for such order as to custody as the Court should see fit to make. The arguments on both sides dealt with both the common and the new statute law; the respondent maintaining that the Act was merely declaratory of the common law rules, and gave no new right to a wife who refused to return to her husband's house when offers to that effect were made to her. Lord Young's judgment seems skilfully to avoid saying anything about the effect of sec. 5:—"We have to consider whether we should use that power which we have, *both at common law and under the recent statute*, to make such an order. In my opinion, *under the circumstances* which have been disclosed to us, and which circumstances I wish neither to detail nor to comment upon, it is fitting that we should make such an order." It is thus impossible to say whether the common law alone would have sufficed, or whether the new statute was to some extent relied on, and there is that reference—fatal to so many precedents—to the "circumstances of the case." In the end an interim order was pronounced, giving the custody of the child to the mother for two months at her own residence in Scotland. Looking simply at the facts, it is very difficult to see how, if the common law was against the mother on the first occasion, it could be in her favour now; for nothing appears to have happened to make the wife's desertion of her husband "legally warrantable;" but in the face of the

pregnant reference to the "circumstances of the case," it is of no use to speculate. Had the order been other than an interim one, it might have been safely inferred that the Court did not read sec. 5 as destroying the common law preference for the father as custodian, since in respect of fitness the parties were both unimpeachable; but it is remarkable that the order limited the mother's custody to the confines of Scotland as jealously as if the proceeding had been regulated by the old common law. This would imply that the Act was regarded as declaratory only; but such an inference is not supported by the subsequent proceedings and by some of the other cases mentioned below.

Soon after the expiry of the two months during which the child was committed to the mother's care, the case came before the Court a third time, on a note presented by the mother asking anew for such order as the Court saw fit regarding the custody of the child and the petitioner's right of access. The state of the facts was then as follows:—The parties had again attempted a reconciliation and failed, the wife declaring her conviction that the state of feeling on both sides was such as to make a resumption of married life out of the question, while the husband refused to make any extra-judicial arrangements with regard to the child on the footing of a permanent separation. Still nothing appeared to impeach the character of either party, and still no new fact appeared in justification (in the legal sense) of the wife's continued refusal to return to her husband. Lord Young says with reference to the wife's declaration that a renewal of the old relations is impossible, that "it would need an inquiry, which we are not in a position to make, to judge of her conduct in that matter. But it is not necessary for us to do that. A large correspondence has passed between the parties, and looking to that I am not greatly surprised at the state of feelings displayed by her, deplorable though it is, and I would not take upon myself to censure her." And then he proceeds, simply accepting the fact that the parties cannot agree together. On the other hand, the Lord Justice-Clerk sounds a note of warning in his concurrence with the leading judgment. He says:—"The case was argued as if the Act of 1886 dealt with cases of wilful and causeless desertion. I am not prepared to say that such a case would be within the spirit of the enactment, but the present case does not come within that category at all." It is really very difficult to distinguish between a desertion "not *legally* warranted," and one that is "wilful and causeless," unless the Court is to constitute itself judge of what amount of, say, incompatibility of temper justifies one spouse in resolving to leave the other. This is the difficulty of saddling the Court with the duty of using its discretion in patching up a family quarrel.

The respondent argued that the Act of 1886, being merely declaratory, and not expressly repealing the common law, must have read into it the words, "under such circumstances as would

justify the wife being absent from her husband." Lord Young at length gives a distinct opinion on the matter; he says:—"We have had a distinct statement of the law on the part of the respondent that, in a case of a child like this, the custody of the father ought not to be interfered with, and that it was contrary to the law of Scotland and to the practice of our Courts to interfere with the custody of the father, unless by his conduct he should have shown himself to be such a bad custodier of his children that we could not trust them with him. *I am not of that opinion. The law is now statute law, and sec. 5 enacts,*" etc. No final order, however, was pronounced; only an interim one giving the child to the mother for the Christmas holidays. Though it was intended to take the child out of the jurisdiction, no reference to that matter appears in the order, Lord Young remarking that there was no fear that the child would not be brought back at the proper time. The importance of this judgment consists in the declaration that the statute has superseded and replaced the common law, though not expressly repealing it; but since the order is only an interim one, and nothing is decided for the future management of the child, no light is thrown on the question whether, under the Act, the parents are to be regarded as, *ceteris paribus*, having equal claims to the custody of a child, or whether any of the old common law preference is still to be shown to the father. Certainly sec. 5 shows no trace of such preference: it bids the Court regard three considerations—1st, the interests of the child; 2nd, the conduct of the parents; 3rd, the wishes as well of the mother as of the father. Supposing both parents to be of equally unimpeachable character, and equally able in respect of means to act as guardians, and equally desirous to have the custody of their children, the plain meaning of the Act would seem to be that the interests of the children alone should determine the question; which would commonly mean that the mother would be preferred in the case of very young children of either sex, and in that of girls, while the father would be preferred in the case of boys of less tender years. But the extreme diffidence of the Second Division of the Court prevents—indeed rather discredits—such a plain reading of the Act.

On the other hand, the opinions in two other cases recently decided under the Act are distinctly in favour of construing the statute without any reference to the rules of the common law. These cases are reported in 25 S. L. R., pp. 399 and 587, under the names *Macquay v. Campbell* and *Campbell v. Macquay*. The questions in these cases do not arise *stante matrimonio*, but the decisions are none the less of importance as illustrating the general question of the effect of the statute. In the first, a mother who has married a second husband, and is resident with him in Florence, applies for the custody of her daughters by the first marriage, who are living with the tutor-nominate of their

father in Scotland; in the second, she applies to have her right to act as tutor to the children of her first marriage (including a boy) under the Guardianship of Infants Act established. In both applications she succeeds—and her success in both instances would have been impossible if the Act had been construed along with the common law. It is well established that no common law mother-custodier can remove the children committed to her care out of the jurisdiction without security, and the claim for custody at common law of a mother who has married a second time is at best a weak one; yet the case was decided without any reference to these common law rules and to the respondent's arguments based upon them. In the second case, the antagonism of the common law to the statute was even stronger on the question of the power of a married woman to act as tutor. Not only is it difficult to revive the *persona* of the mother for the purposes of the tutory, while it is merged in that of her husband, but there is the theory to overcome that the control of a step-father is not the most desirable. Violence must be done both to the legal idea of the *potestas viri* and to a sound practical rule. The Lord President, however, says:—"It is clear to my mind that the statute did not take account of any principle of common law which might be opposed to any provision of the Act. We know there are great differences between Scottish and English law on such subjects as the guardianship of children, . . . and the relations of parent and child. . . . But this section now under consideration applies to the whole United Kingdom; and so instead of attempting to recognise the common law principles of the various systems, it makes a positive rule which passes them all by, and takes no cognisance of any of them." The section immediately under consideration was not sec. 5, but sec. 2; but the opinions here expressed, particularly in the first sentence, are of general application. Nor is there any hesitation, such as appeared in *Mackenzie's* case, shown in allowing the mother as custodier to remove the children, out of the jurisdiction of the Court, to Florence, where she herself is domiciled, although troublesome questions may arise in such a case if necessity should arise for the exercise by the Court of its powers of removal of the mother-guardian.

The question whether the Act applies to illegitimate as well as to legitimate children was raised but not decided in the recent case *Hammel and Brand v. Shaw*, reported in 25 S. L. R., p. 332.

On so important a matter it is greatly to be regretted that much doubt should exist; but until a bolder decision on sec. 5 is uttered, the precise effect of the new Act must remain in uncertainty.

CONFLICT OF LAWS IN REGARD TO MARRIAGE AND DIVORCE.

At the meeting of the Institute of International Law in Heidelberg last year, the subject of the conflict of laws in regard to marriage and divorce was discussed. A set of general rules was adopted, which, it was believed, would, if embodied in international treaty, secure uniformity of decision in these matters for the future. Two questions were reserved for future discussion. But it was remitted meanwhile to a committee (consisting virtually of MM. Rivier and Rolin-Jaequemyns) to draw up a system of rules carrying out the resolutions of the Institute. At the meeting this year, held at Lausanne on the 4th of September, the committee's report was presented. They propose the following text, which we translate from the *Revue de Droit International et de Legislation Comparée*, Tome xx., No. 4.

SCHEME FOR THE INTERNATIONAL REGULATION OF CONFLICTS OF LAWS IN REGARD TO MARRIAGE AND DIVORCE.

I. *Of the law which regulates the form of the celebration of marriage.*

Article 1. With the exception of the cases provided for in the following article, the law which regulates the form of celebration is that of the country where the marriage is celebrated.

Article 2. The following marriages shall nevertheless be universally recognised as valid in respect of form; viz.—(1) Marriages celebrated in non-Christian countries, if conform to the conditions in force there; and (2) Marriages at a legation or consulate, if celebrated in the forms prescribed by the law of the country which the legation or consulate represents, and provided, also, that both the contracting parties belong to the said country.

II. *Of the law which regulates the conditions which are necessary in order that a marriage may be celebrated.*

Article 3. In order that a marriage may be celebrated in a country other than that of either of the spouses, it is necessary that the future husband and the future wife satisfy the conditions prescribed by the law of *their respective nations*, in respect to (1) age; (2) the forbidden degrees of consanguinity; (3) consent of parents or guardians; and (4) publication of banns. Further, it is necessary that the future husband and the future wife satisfy the conditions prescribed by the law of *the place where the marriage is celebrated*, in respect to (1) the forbidden degrees of consanguinity, and (2) publication of banns.

Article 4. The authorities of the country in which a marriage is celebrated shall have power to grant dispensation from impediments resulting from consanguinity between the spouses or from their being allied through marriage, or from the absence of consent

on the part of their parents or guardians, in those cases in which, and to the extent to which, this power would, by the national law of the future spouses, belong to the authorities of their respective countries.

Article 5. It will be competent for diplomatic and consular authorities to grant certificates stating that their countrymen who are intending to contract marriage satisfy the conditions required by the law of their nation.

III. *Of the law which regulates the conditions of validity in defect of which a marriage which has been celebrated can be annulled.*

Article 6. A marriage may be annulled if it has been contracted in violation of the conditions required by the national law of one of the spouses, in respect to (1) age, (2) forbidden degrees of consanguinity or affinity, or (3) publication of banns.

Article 7. Similarly a marriage may be annulled if it has been contracted in violation of the conditions prescribed by the national law of the future husband, in respect to the consent of parents or guardians.

IV. *Of the law which regulates the effects of the marriage and marriage contracts.*

Article 8. The effects of marriage on the status of the wife and on the status of children born before the marriage are regulated by the law of the country to which the husband belonged at the time when the marriage was contracted.

Article 9. The same rule holds in regard to the effects of the marriage on the personal rights and obligations of the husband towards the wife, and of the wife towards the husband.

Article 10. Marriage contracts relating to the estates of the spouses are regulated, in regard to form, by the law of the place where they have been entered into.

Those marriage contracts, however, which have been made according to the forms required by the national law of the two parties, ought equally to be considered valid.

Article 11. Without prejudice to the rights of third parties and to the results of the particular legislation of every country in regard to real property, the intrinsic validity of marriage contracts relating to the estates of the spouses, their effects and their interpretation, are regulated by the law of the country to which the husband belonged at the time when the marriage was contracted.

Article 12. Failing a marriage contract, the law of the country to which the husband belonged at the time when the marriage was celebrated regulates the patrimonial rights which either spouse shall have over his or her own estate present or future, or over the estate present or future of the other, even although the spouses, or one of them, should have changed nationality or domicile during the subsistence of the marriage.

V. *Of the law which regulates the effects of nullity of marriage by decree pronounced in the country of one of the spouses.*

Article 13. When a marriage, valid according to the law of one of the contracting parties, shall have been declared null in the country of the other, the marriage shall be considered as null universally, except in so far as regards the civil effects of a reputed marriage (*un mariage putatif*).

VI. *Of the law which regulates divorce.*

Article 14. The question whether or not divorce is competent depends on the law of the country to which the spouses belong.

Article 15. If the principle of divorce is admitted by the law of the said country, the grounds on which it shall be granted shall be those of the place where the action is raised.

Divorce granted according to the requirements of the proper tribunal shall be universally recognised as valid.

VII. *General provision.*

Article 16. In all cases where, according to the preceding rules, the national law of one of the spouses falls to be applied, if that spouse belongs to a State where different civil laws co-exist, the question of which of these laws ought to be applied shall be decided according to the municipal law of the said State.

THE TURFBURGH TRAGEDY.

Gaboriau Out-Gaboriau'd.

I.

If he had been a one-legged man he might never have been detected.

This is how it was.

One night in early spring, now some years ago, the quiet citizens of Turfburgh retired to rest at their usual hour. It is a secluded place, and its manners are primitive; still, we do not mean ~~it~~ to be understood that all its worthy inhabitants retire at one and the same time, or that there is, in curfew style, a stated hour for their going to roost. Far from it. No sphere is too minute for diversity of tastes and habits. Between the position of the hands on the face of the clock, when the early-rising pointsman removed his croquet-patterned india-rubber collar as the first stage in his process of undressing, and the position of these same hands when Deacon Samuels issued from the side-door of Roger's new restaurant, there was a substantial difference—a difference marking a lapse of time long enough to allow the

pointsman to get through a full third of his night's sleep. But, on the evening we write of, the good townsfolk went to bed, each at his or her accustomed hour, and there was nothing unusual in the aspect of the little town. So humdrum and so matter-of-fact are some places that they cannot even produce omens of impending ill.

When the midnight train drew up at the Turfburgh platform, three people descended from it. An elderly woman, embracing many odd parcels, got out of a third-class compartment. Let us straightway dismiss her from our further attention, along with the two women and the cold boy who had been waiting for her on the scantily-lit platform. None of them come again into this story. From a first-class smoking compartment came one of the two other arrivals. With him we have more concern. This man carried a travelling-rug over his arm, and newspapers protruded from his bulging coat-pocket. Sundry bags made up his luggage. This person, who was a tall man with a shallow face, and long black hair and whiskers, stood irresolutely in front of his carriage when he had got out of it, and looked about him gloomily enough. It was certainly not a cheering outlook before him. The station was dreary and all but dark; the night was bleak, and a cold penetrating wind, which swept the platform, and caused the light, still lingering in every third lamp, to flicker precariously, and to threaten to follow the example of its economical companions, and go out too, chilled the traveller to the very marrow. He shivered a little, and pulled his furred collar higher up about his throat and neck. As no one came to the stranger's assistance, he proceeded to remove his belongings from the carriage himself. This done, he asked the passing guard to be good enough to direct him to the station hotel. After that haughty official had whistled the shrill signal for his train to start on its way to more important stopping-places, he condescended to tell our passenger (who had not tipped him for not doing anything) to cross the bridge to the other side of the station. Off went the train, with its noise and animation, leaving blankness and stillness behind. After looking once more about him, and this time rather angrily, in quest of a porter, the tall traveller gathered up his luggage as best he could with only two arms, and proceeded to cross the foot-bridge as he had been directed to do. Then it was that he descried the hotel-porter, duly labelled in yellow on his scarlet hat-band, walking on the opposite platform towards the hotel. The porter carried a well-battered, over-fed, corpulent bag, the property and sole travelling equipment of a short, very stout, red-faced man who followed him. This was the third passenger who had got out of the train at Turfburgh. A long grey ulster, threadbare, but preserving amidst its undisguisable shabbiness an impudent audacity and assertiveness of pattern, sadly interfered with the free motion of the little man's little legs. His face bore the cruel traces of small-pox, and his beard and whiskers were sandy-

coloured and thin. No gloves protected his cold coarse hands; and his hat, as the pathetic phrase goes, "had seen better days." It is no wonder then that the tall stranger, struggling beneath his awkward burden of bags and wraps, should have felt a trifle chagrined when he saw the solitary porter attending to this vulgar little man instead of him.

By and bye, both were seated in the coffee-room of the hotel. Truly there are coffee-rooms and coffee-rooms. Some admit of stiffness among the occupants, and of the icy isolation dear to the British traveller. Others preclude the possibility of such luxuries, and by their size and construction afford to your free-and-easy affable man an opportunity of forcing his company on you, and of drawing you out of your self-containedness. The coffee-room at Turfburgh was of this latter kind. It was very small indeed; neat, fresh, new—but the very smallest coffee-room you ever saw (the whole hotel being in miniature). Just a few large articles of furniture,—including a table, a sofa, and a sideboard, and some strait-like passages between them,—a blazing fire, and on the walls some painful prints from Leipzig. So that the vulgar little man, as he sat in his easy-chair by the fire, with his carpet slippers well elevated chimney-wards, could make chatty remarks to the stiff stranger who was still refreshing himself at the table. The cheery little man had early regaled himself with a cup of tea, accompanied by a rackful of toast with marmalade. Now he was drinking a comforting glass of grog by the fire, with good-nature beaming all over his ugly little face. His fellow-traveller was engaged over a more elaborate repast, for which he had been content to wait some time longer. It is to be owned that the little man was not easily daunted, and he renewed his attempts to enter into conversation again and again with much persistency. But even his energy and affability were not proof against the chilling rebuffs with which his overtures uniformly met. At length he desisted. Thereafter his remarks were addressed exclusively to the old rheumatic waiter. For the tall man had mentally classified the small man as a "commercial," and had simultaneously resolved that he would not suffer himself to be bored or plagued by him. So he moodily went on with his refreshments, glancing from time to time at one of his many newspapers, as it lay at the side of his plate.

"Anybody else in the house, David?" asked the little man of the waiter, on the occasion of his entering for a sixth time with no other apparent object than to poke the fire.

"Two gentlemen, sir," was the reply. One, he said, was Mr. Jujube, who came there often.

To this the little man broke in that he knew "the party," knew him well; he travelled for Black, White, & Co., the oil and colourmen.

("Ah," thought the tall man, "I was sure that I could not

have been mistaken. That jaunty little wretch is beyond doubt a bagman.")

"The same, sir," rejoined the waiter, and he went out reluctantly.

The little man pulled out the current number of the *Fortnightly Review*, and taking from his pocket a showy paper-knife—manifestly extracted from a complete two-and-sixpenny writing desk—he cut up the last third of the book, advertisement leaves included.

"Odd this!" ruminated his fellow-traveller, "very singular! I should not have thought that commercial travellers were addicted to that class of literature. Can I have been mistaken in my opinion of that man, I wonder?"

The waiter came in again, as waiters always do. You can out-sit your own servants, and be the last to go to bed; but no one ever yet out-sat a waiter. He of the carpet slippers had not devoted much time to his periodical. Indeed, the tall stranger had noticed that he had confined his attention to the advertisement sheets at the end of the book. He now put it down, and asked the waiter who was the other "gent" who was staying in the "house." Now the waiter had not much to say of the other occupant of the hotel. Facts were scanty, and he was not clever enough to invent particulars so suddenly.

"Number 13, gentlemen," said he,—thus formally including the tall traveller amongst his audience, much to that stilted person's annoyance,—“he's a very quiet gentleman. He come this evenin' by the 9.47. I b'lieve he's from London myself; but he haven't put no address down in the visitors' book. He went to his room early, and his orders is to call him at 6, to catch the 7.7 to Glasgow. Yes, gentlemen,”—this last being the invariable peroration of a waiter, irrelevant but deferentially acquiescent. Then he added, addressing himself to the short guest alone: “Colonel Drumfield was in town to-day, sir, and he left word for you here as how his lady would like you to call in there if you was passin' that way this week.”

“Oh—ah! All right; I'll remember,” said the man in request.

“Colonel Drumfield?” repeated the tall man to himself, “Drumfield of the Dépôt here. This creature can't be a bagman after all.”

The short man had meanwhile pulled out a pocket-case to consult some letters. Some of these he laid down on the table, while he arranged them and read from them. As the tall stranger rose from his refreshments, and went to enjoy a share of the fire for a moment, his eye fell on some of these letters, and on one envelope he observed an earl's coronet. Moreover, from his new position he could see on a footstool by the side of his companion's easy-chair not only the discarded *Fortnightly*, but also the *Saturday Review*, the *Athenæum*, the *Academy*, and the orange covers of *Chambers' Journal*."

"Some literary man, I suppose; of vulgar appearance and eccentric habits." Thus he soliloquized,—for, inasmuch as he

never read any such periodicals himself, he regarded some of them with vague awe,—and as he soliloquized he took up a letter which was placed prominently in front of a wood-carved Swiss-bear match-box on the mantelshelf. The address which he read on it was “Mr. Jacob Jujube (travelling for Messrs. Black, White, & Co., of Manchester), Station Hotel, Turfburgh.” His handling of the letter did not escape the sharp eyes of the other, who blandly interposed,—

“For Jujube. Strange address, sir? Rather a shame to put that on a gentleman’s letters. Surely the name of the hotel was sufficient after the party’s own name. ’Taint likely two gentlemen of the name of Jacob Jujube would be in this house at the same time. ’Guess it’s all an advertisement of Black & Co.’s? Shouldn’t think Jujube will care to be labelled that way; should you, sir?”

Quoth the stiff stranger to himself (he merely murmured something inarticulate by way of audible reply), “This person is a commercial traveller.”

The tall traveller lay tossing in his bed, trying to woo sleep, the proverbially coy. Two hours had been spent in vain effort, and now he gave it up in despair. At all times a bad sleeper, his wakefulness was incorrigible when he passed a night from home. Strange surroundings in the matter of bedroom were too much for his morbid nerves, and he always looked forward to them as a certain cause of misery. This night was no exception. At length he rose and looked from his window, which faced the town. The little place was hushed in perfect stillness; nothing waked but himself. Not even the policeman’s tread broke the noiselessness, for the good constable was seated in the signalman’s cosy box. It was a crooked little street that the stranger saw under his window. In it, so to speak, the present was just beginning to welcome the past. Here and there stood some newer and larger building, in which a tradesman of the more prosperous class might keep his shop. By the light of the few dusky lamps he was enabled to read the names on one or two of these; and his mind wandered back to his fellow-traveller. No doubt he was a commercial traveller come round to make bargains with these very shops,—perhaps to sell drugs wholesale to the tenant of that which bore the words “Pharmaceutical Chemist” over the door; or, it might be, to display tempting patterns of his “house’s” goods to the draper who rented that shop with the extensive front just opposite the hotel window. But then whatever did a bagman mean by reading the *Fortnightly*, the *Athenæum*, or the *Academy*? And how came it that a bagman received letters with earls’ coronets on the envelopes? Why should colonels’ ladies send such a person informal invitations? The wearied man closed his blind, and went back to bed to put himself once more in train for slumber. All to no purpose. He tossed about restlessly as before. But now

his jaded and excited brain kept working out the question of the small man's calling in life. Cease from this problem it would not. Was he a bagman; or was he some eccentric literary man? Now he would sum up the evidence for and against each view, and decide the case one way; then some fresh argument or some detail half-consciously noted during the evening would upset all that, and the perplexing process of conjecturing would be started anew. Again and again, with strong and painful effort, he tried to banish the subject from his mind. How utterly ridiculous it was, he reasoned with himself peevishly, that anything so utterly trivial should so keep hold of his imagination in spite of his will! What was this man to him—what matter whether a "gent" or no? But reasoning was useless. There he lay, perplexing and puzzling himself, exciting and exhausting his restless brain, as he had done many a livelong night over a chess problem which had happened to haunt him.

An irresistible impulse came over him at last. He must rise, and ascertain once and for all who and what this person was. That—for thus he tried to justify the strange conduct he meditated—that it required justification he felt even in his then morbidly excited state—that would explain all; it would allay his fretful curiosity; perhaps it might dispose his mind for sleep. He got out of bed, and partially dressed. Then came to him for a moment a cold draught of hesitation and irresolution. He had once more begun to undress, when restless curiosity again triumphed, and, taking up his candle, he opened his door and went out.

His first adventure was to stumble over his own boots, which stood on the mat. Then he proceeded to the entrance hall, gingerly feeling his way, which the flickering candle made but dimly visible. In the blotted visitors' book, however, the long nervous finger found no satisfaction of the doubt which drove him to "revisit the pale glimpses of the moon." There were many names on the soiled and well-smeared pages; but under that date (or, more accurately, that of the day before) there occurred only the entry of "the quiet gentleman" alluded to by the waiter under the mysterious designation of "No. 13," but there described in his own handwriting as "F. C. Judson," and the entry of Jacob Jujube aforesaid. Apparently the small man was too frequent a visitor at the establishment to enter his name in the ordinary register. Perhaps the hour of arrival was so late that it was not thought seemly to trouble either that puzzling personage or himself with so unimportant a formality. It may have been a temporary approach to insanity. Whatever the explanation, this strange victim of insomnia and inquisitiveness was almost desperate. No longer was the impulse the comparatively wild feeling it had been to start with. A burning desire possessed him, and impelled him blindly on to discover what was the avocation of the harmless little vulgar man with whom he had been thrown

together for a short time. He did not pause either to analyze the impulse under which he acted, or to count the consequences of his act. He noticed that he was passing a pantry with house-maid's brushes; then he saw a door marked No. 12—with a pair of well-brushed, well-worn, short, broad, vulgar little shoes outside; and then he discovered that he was in the said room. There, under a knitted night-cap, was the scarred round face which haunted him. The little man's clothes were flung untidily about the room. And now the tall stranger was mechanically examining the corpulent hand-bag, which gaped widely, glad to be unlaced after the galling tension of the day. He took out a gaudy smoking-cap, suggestive of domestic presents or village fancy fairs; and after relieving the gorged bag of some odd garments, he pulled out a tuning-fork and an envelope which he found to contain strings for some musical instrument. "A musician!" concluded the strange visitor; "some travelling artiste. I might have guessed as much." But there was no evening dress in the bag, and that perplexed him. On the toilet-table lay the letters. He read one or two. The earl's coronet missive was from a countess to a firm of pianoforte-sellers in a neighbouring town, asking them to send a tuner to her pianos, and to send with him some strings for her daughter's guitar! The little man was one of the firm—so his other papers showed; and he was tuner as well. This explained the colonel's message too. The creature was on his rounds. And the high class periodicals—what of them? The explanation is not startling, and it is matter of fact. The said firm was an enterprising one. It had inventions, it had hire systems. What more natural than that it should advertise in periodicals which have a circulation amongst the more cultured classes? And what more business-like and cautious than that the advertisers should purchase copies of the *media* in which they advertised, just in order to see for themselves that the notices for which they had paid so highly were duly inserted?

The tall stranger felt satisfied, and he so far recovered himself as to reflect on what he had just been doing, and to feel thoroughly ashamed of his mean and contemptible conduct. "That vulgar little cad would never have been guilty of so despicable behaviour as mine," he soliloquized, "bagman though he may be." He had not all his wits about him even yet. But he glided back to his own room in haste. Arrived there, he proceeded to undress in the dark—for in his excitement he had left his candle in the little man's room. He was not conscious of the fact, and never missed the light. As he flung his coat down on a chair, he heard something hard and metallic fall on the floor, dropping apparently out of the pocket. He groped along the carpet with his hands for a little in an endeavour to find the article. But his fingers encountered nothing; and not being able to fancy to himself what the thing might be, he resolved, in the half-stupid state in

which he was, to defer his search for it until morning. Tired, and now at last very sleepy, he got into bed. The adventure, on which he did not care to dwell, had at all events allayed his morbid curiosity, and had brought him the drowsiness for which he had longed ; and in a very few minutes he was fast asleep.

In the morning the tall traveller was found dead in his bed—strangled, as the horrified doctor pronounced.

It seemed all pretty plain. The lady manager thought so ; the waiter thought so ; the doctor was certain of it ; the policeman did not demur. It was far, far from plain to the poor little pianotuner ; and there was one sceptic besides,—the holder of the joint offices of Porter and Boots, whom many tips and much familiarity in bygone days had prejudiced in favour of the little man. But still, as the impulsive lady manager put it, What more could you want ? what could be more clear ? To begin with, the little man's bedroom door was standing ajar when the chambermaid first passed it in the morning, and it was so when the Boots went to call him. Manifestly the occupant of the room had been out of it during the night, for the sceptical Boots was obliged to depone that the door of No. 12 was shut when he removed the boots, and still remained shut when he replaced them cleaned. Then in the bedroom of the small man was found the candlestick of the murdered man. What could that mean but that the said small man had been in the said murdered man's room for some purpose during the night, and had fetched away his candlestick in fatal mistake ? And, most conclusive evidence of all (" which there was no getting over," as the lady manager said, and at which even the stolid policeman almost committed himself to an opinion by shaking his pasteboard helmet ominously), on the floor of the dead man's room, and close beside his bed, were found a tuning-fork and a letter ! The former was the article which had fallen from the dead man's coat as he retired. For a moment the tuning-fork incident almost convinced the Boots, for it was a distinctive implement of his little patron's industry, a badge of all his tribe ; and then, too, the bewildered little man owned that the tuning-fork was his. Moreover, the letter found beside the tuning-fork (and which had really fallen out along with it) was directed to the little man. It was the aforesaid missive from the countess. These circumstances seemed to the coolest of the startled little knot of investigators to make as complete a chain of circumstantial evidence as ever connected an accused person with a crime. The doctor made an elaborate examination there and then, although he knew that an authorized *post mortem*, under warrant of the procurator-fiscal (Turfburgh is only in Scotland !), must follow. He thought with pleasure of his medical report, and of the very big words he would introduce into it. Delightedly, as he fussed about, he pictured himself appearing in the Circuit Court of Justiciary, and reading out these same big words in a big voice before a big audience—he

was small in stature, this doctor, and big things were his ambition. The symptoms, he announced, were the unmistakeable signs of death by strangulation. The eager creature looked hard to find amongst the marks of violence (there had been a struggle) some distinctive traces which would point to one individual rather than another as perpetrator of the crime. Some of the glory might thus come his way. He was most anxious to bear out with his skilled evidence the story told by the other circumstances; and he was not a little chagrined at his failure to discover anything beyond the apparent cause of death.

The policeman made a search of the luggage and belongings of the murdered man. His letters and other papers identified him as a sporting baronet, well known to them all by name and repute, whose property was in a neighbouring county, but whom they had never previously seen. His watch was not to be found, nor were two handsome rings which, on his arrival, had attracted the attention of the lady manager, and of which the waiter was ready to swear he had taken special and repeated notice on the preceding evening, while the deceased was at supper in the coffee-room. Except some loose silver in one of his pockets, no money whatever could be discovered in the clothes or amongst any of the luggage of the murdered man. Afterwards the constable made an equally minute examination of the small man's room, No. 12, and of the small man's luggage; but no money was to be found there—none even on his person, except two dirty one-pound notes and a modest pittance of change. No valuables could be ferreted out—no watch, no rings. Clearly, if the occupant of No. 12 was the culprit, and his object plunder, he had had some handy resetter nigh. Still the policeman saw no way out of it. He was not acquainted with Hamlet, but he felt much as that shirking prince did about the time being out of joint, and the cursed spite that ever he was born to set it right. He was perplexed, for this was his first murder case. One thing was clear, he must arrest some one. He put a pair of handcuffs on the half-dazed little piano-tuner, and led him off.

(To be continued.)

LAWYERS AND CONGRESS.

IN reference to the article on Lawyers and Partisanship which, in our last number, we reproduced from the *Economist*, the following remarks may be interesting to some of our readers. They are taken from a speech delivered before the Harvard Law School Association by the Hon. D. H. Chamberlain of New York:—

“There is another aspect of the profession of law which may well be considered on occasions like this—what may be called its public side. The historical prominence of lawyers, or those trained

as lawyers, in the public life of the country is unquestionable. Statistics of this fact at any period of our history are almost startling. Probably from the earliest periods of the civil experience of America, the relative number of lawyers at any given time engaged in the public service and their relative influence has been greater than in any other contemporaneous nation, and contrary, perhaps, to the general impression, their relative prominence and influence is not diminished or diminishing now. Every member of the present National Executive—the President and the Cabinet—is now a lawyer, though only one of the eight need be. The membership of Congress shows now, as at all times, the preponderating number as well as the leadership of those who have been trained in legal studies or practice. It is not hard to explain the fact. The causes are general and fundamental in their nature. For example, we seldom, I think, reflect duly upon the fact that the field of the direct application of law—statutes—is wider here than elsewhere. Our inheritance of governmental customs and traditions is small. In England, France, or Germany the training essential or most advantageous for public life consists, broadly speaking, in familiarity with the history, practices, ancient and unbroken traditions, immemorial usages, of the government, the mastery of which, in the sense of statesmanship, requires the most highly disciplined powers of mind, the most specialized and prolonged training, but not of necessity the particular discipline or knowledge of the lawyer. Here, on the contrary, our great governmental departments, functions, and agencies have been created and are regulated almost wholly by statutes, which must be construed by the methods and rules with which lawyers are necessarily, as lawyers, most familiar. In a word, prescription prevails there, statutes here. I do not readily recall one English statesman of the present or the last generation, of the first rank, who owed much of the fortune or fame of his earlier or later career to studies or experience as a lawyer. On the other hand, except Washington, I do not readily recall one American statesman of the same period, of high rank, who did not obviously find his earliest opportunities of public service, as well as the conspicuous power and success of his career, in the peculiar training which legal studies or professional legal life had given him. I would not be thought to infer from this fact, that legal training and experience are generally best adapted to develop and train the statesman-like faculties and habits of mind. I think there are some grave defects in such training for public life, even in this country. I think I observe that our greatest statesmen have contended against some disadvantages and limitations arising from the nature of their studies and life as lawyers; but that the fact that lawyers are so largely the sources of authority on public questions here, as contrasted with those of other modern constitutional governments, is a constant cause of their predominating number

and influence in our public life can hardly be disputed. Add to this the consideration of the nature of our government and civil life, a democratic republic, moving on lines traced by a written constitution and based on a practically universal suffrage, and we cannot fail to see how, to the opportunities and advantages for public life afforded by the lawyer's profession, is added the incentive of responsible citizenship and the spur of a free popular career, *carriere ouverte aux talens*. Thus comes to pass, thus has come to pass, the fact of the vast disproportion of lawyers in our highest public places—a result natural and unforced, determined by the conditions of our history, our form of government, and our political society."

NUMBER ONE.

"PRIOR tempore, potior jure,"
 This is one of nature's laws,
 Where no comment casts a new ray—
 Pettifogger finds no flaws.

If one sparrow early rising
 Finds a worm going home to bed;
 It is not the least surprising,
 Number two must go unfed.

When the lion is a-lying
 With a lamb in his inside,
 Other lambs are not found crying
 For the space preoccupied.

So the man at Pool Bethesda—
 Hebrew hydropathic cold—
 Found this maxim true, and blessed a
 Neighbour, whom he would have sold.

In a play-house, church, or railway,
 If you come in *à la queue*,
 This arrangement French in tail-way
 May curtail your seat or pew.

"First come, first served," is the British
 Version of this golden rule;
 Though a Briton is not skittish
 If he find all places full.

Nature's thus taught all creation—
 Birds that fly and beasts that run,
 Men of every age and nation—
 To look after "Number One."

Reviews.

THERE is some risk during the dull season of our having to deal with this branch of our contents as an author did in the case of a well-known essay. He chose as his subject, it will be remembered, that of "Snakes in Iceland." The title was attractive enough, and seemed to promise both wholesome scientific instruction and sportsmanlike excitement. But when, eager from these feelings, you came to turn to the paper itself, you found the courageous opening (and closing) statement—"There are *no* snakes in Iceland." Now, at this season of the year, when publishers prepare a good deal, and issue little, our readers are apt to repeat the experience just referred to. Use and wont may cause us to place the heading "Reviews" in our list of contents; and when our pages are turned over, and this part of the magazine reached, there is some chance of a notice meeting the eye to the effect that there were no new books to be reviewed during the past month.

The only publication which has reached us is the First Supplement to Dr. Mair's *Digest of Church Laws*. It covers the period from April 1887 to August 1888, and it digests very concisely, and classifies, all matters arising within that time which bear on the laws and government of the Church. The Acts of Assembly and its proceedings, and the Court of Session decisions here dealt with, are both interesting and important. Amongst the former are the Act on Simoniackal Practices (1888, xvii.), the "Regulations for setting apart Deaconesses" (1888, vi.), the Regulations as to Election of Commissioners to the Assembly (1887, vii., and 1888, xxii.), etc. There is also an article of considerable length on the Commission of Assembly, treating of its origin, practice, business, and powers, and in the course of this the Cross case (1887, ix.) is noticed. Some of the decisions now digested are the Duthill case (C.S., July 15, 1887), anent the excambion of churchyard and church site; the case of St. Margaret's, Edinburgh (C.S., July 20, 1887); the Aberlady case (C.S., July 16, 1888) as to prescription in the valuation of teinds; and the Roscobie case (C.S., February 1, 1888) as to a bar in patronage compensation. This Supplement also corrects a few errata in the original work, and is a valuable addition to that volume.

The Month.

SEPTEMBER, perhaps now more completely than August, is the close time for lawyers. At the Parliament House last month there were only tourists and city guides to be seen. In Edinburgh and

Glasgow offices "the other partner" of each firm of solicitors was taking his holiday. Even in the various county towns the Courts held have been few and the business prosaic.

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CONSEQUENTLY there is little to be recorded of legal interest. There was, of course, the Second Box Day in the Court of Session on the 13th, with a rather thin array of cases called. A discussion or two in the Bill Chamber, and the holding of the Circuit Courts in a few towns, make up the operations of the Supreme Courts during the month.

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DOUBTLESS cases have been cropping up meantime. While lawyers in general were shooting grouse and longing for partridges, no doubt several irate and exasperated citizens were "putting the matter into the hands of their solicitors," much to the future emolument of the said shooters. But all that is as yet subterranean and will only emerge by and bye.

* * *

THE case of Mr. Charles Stewart Parnell against the proprietor and publisher of *The Times* was called on 13th September, per the Right Honourable J. B. Balfour, Q.C., M.P., Mr. Asher, Q.C., M.P., and Mr. R. U. Strachan. Appearance for the defenders has been entered in the names of the Dean of Faculty, Q.C., the Solicitor-General, Q.C., M.P., and Mr. A. Graham Murray. The pursuer's agent is Mr. R. Ainslie Brown, and the defender's agents are Messrs. J. & F. Anderson, W.S. The case is marked to Lord Kinnear's Court.

* * *

THE work at the Circuits was light. Several towns had no cases to be tried, and consequently were not visited by the judges—the time-honoured maiden Circuit Courts, with their white gloves and exchange of compliments, having been abolished by the recent Act. They have vanished, lamented by hotel-keepers and glovers alone. No one else regrets their disappearance, and time and money are both saved hereby. Some places, however, which could boast of a criminal or two requiring trial, were not visited this autumn. The cases were tried elsewhere. This perhaps is not so satisfactory a change either to the officials of the place where the crime has been committed, or to those of the place where the Court sits. The Ayrshire cases (and they appear to have been both numerous and important) were tried at Glasgow Circuit on the 11th, 12th, and 13th September. The Dundee cases were set down for trial in Perth on the 13th. We do not know in what light the Dundee citizens will regard this alter-

ation. Not yet beyond living memory is the agitation which that large and wealthy town made to secure these periodical visits of the High Court of Justiciary; and that agitation was successful. But at the Autumn Circuit, in the interests of economy, the more populous place was again obliged to send its criminals for trial to the less populous.

* * *

THERE occurred at the Glasgow September sittings of the High Court a case of considerable commercial importance. Two persons named M'Leod, partners of a firm of S. & R. G. M'Leod, were tried on an indictment, charging that, in pursuance of a fraudulent scheme for obtaining and appropriating the goods of others by false pretences, they had made to various traders representations as to their capital which were false, and so obtained goods to a large quantity, and appropriated them without paying more than a small part of the price. The indictment did not say that the accused "never intended to pay," or "had not paid" for the goods; for the peculiarity was that part payment had been made before bankruptcy came, and criminal proceedings supervened. It was objected to, on various special grounds, though not on the ground that it did not contain these words, but without success; and the result of the evidence was that the accused, being asked by traders who had refused to deal with them without knowing their capital, informed them that they had a capital of £16,000, of which only £6000 was borrowed, and that they were doing a large and prosperous business. The truth was that they had not a penny of capital, but only a large and uncertain loan at $12\frac{1}{2}$ per cent. from a distant relative of one of them. The natural result came after a few years of this unhealthy trade, and the firm succumbed. Then the indignant creditors gave information to the public prosecutor. The jury was told by the presiding judge, that while previous cases of the class had no doubt been very different in their facts (being mere long firm cases, or cases of swindling hotel-keepers out of a night's lodging by a false story), the charge, if they thought it proved, was not different in kind merely because there was a real firm and a real business. The verdict was one of guilty, and the sentence six months' imprisonment. This prosecution is understood to have given much satisfaction to traders, and has been favourably commented upon in the daily press. The indictment will serve as a style in the similar many cases which, it is a little to be feared, Crown Counsel will, for a time, frequently be groaning under, if the conviction does not deter others from "doing the like in time coming." A charge made in the same case under the Debtors Act was held irrelevant, on grounds which were of less general importance than an opinion given by, at least, one of the judges on this point. That Act makes it criminal for a bankrupt to have

obtained within four months before sequestration, "by any false representation," goods on credit for which he has not paid. In the M'Leods' cases the goods had been obtained within four months on credit, and not been paid for; but the false representation was not originally made within the four months. It was the old falsehood which had lived on, and done part of its work within that time. Lord M'Laren thought that the true construction of the Act must be that favourable to the prisoner, in other words, that a charge would be irrelevant which does not state that the representation as well as its result took place within the charmed period. If that opinion be generally followed, the common law will, as in the M'Leods' case, be found a far more useful weapon than the Act. But perhaps the Debtors Act of 1880, already scarred by many wounds and discredited by many objections, will not lose much more reputation by this opinion.

* . *

THE Special Commission under the "Members of Parliament (Charges and Allegations) Act," held its first sitting within the Royal Courts of Justice in London on the 17th September. The business of this first meeting was preliminary to the opening of the inquiry. The origin, the composition, and the powers of the Commission, the peculiar nature of the subject-matter of the inquiry, and the peculiar form in which it comes before the Commissioners, necessitated a sederunt of the kind. Sir James Hannen, who presides, made an opening statement in regard to the view which their Lordships take of the range of the inquiry; and also of the procedure to be adopted. The former of these is sufficiently defined by the second sub-section of section 1 of the statute, viz.—"The Commissioners shall inquire into and report upon the charges and allegations made against certain members of Parliament and other persons in the course of the proceedings in an action entitled *O'Donnell versus Walter and another*." The inquiry, the President said, is therefore restricted both as to the persons and the charges and allegations which were made in the course of the proceedings in the action named, "and only those charges and allegations so far as they affect the persons against whom they were directed in the course of those proceedings."

* . *

THE second matter to be settled before opening the investigation—that of the nature of the principles on which the inquiry is to be conducted by the Commissioners—is not so explicitly dealt with in the statute, and from the novel nature of the inquiry is not settled by precedent. In fact, with the exception of what is implied in the granting of certain powers as to witnesses and documents in sections 2, 3, 4, 8, 9, and 10, no indication of the

form which the inquiry is to take, is given in the Act. The Commissioners have decided—(1) that the investigation shall be conducted, in the first instance, as if it were an issue directed between the defendants in the action before named, and some other persons, against whom the charges and allegations were made—reserving power to the Commissioners, however, to call any persons who were not parties to the action, if in the opinion of the Commissioners these can throw light on the issues involved; (2) that the investigation shall be conducted “judicially, and, as far as the circumstances will permit, according to the rules of procedure and evidence which prevail in *other Courts of Justice*.” (*Sic.*)

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THE rulings on these two points at once raised the further question: On which of the parties indicated in the said action does the burden rest of opening the inquiry? After hearing arguments, the Commissioners carried out the principle of the above rulings by following the analogy of an ordinary action of libel, in which he who alleges is the person to begin; and it was decided that the defendants in the action of *O'Donnell v. Walter and another* should begin.

* *

COUNSEL who represented the eighty-five gentlemen constituting what is known as the Irish Parliamentary party, applied for a discovery of documents. This was opposed by counsel for the aforesaid defendants. He contended that the words of the 3rd sub-section of the 2nd section of the Act—viz. “The Commissioners may, if they think fit, order that any document or documents in the possession of any party appearing at the inquiry shall be produced for the inspection of any other such party”—gives no jurisdiction to the Commissioners to compel *discovery* of documents by affidavit. The Commissioners decided, on the ground that all those who appear before the inquiry are in a position analogous to parties to an action, that they had the power of directing discovery to be made against any party appearing at the inquiry; and they granted the application.

* *

CLAUSE 2, sub-section 1, gives the general powers, rights, and privileges vested in Her Majesty's High Court of Justice, or in any judge thereof, to the Commissioners collectively, not to them individually. That, as the President explained, was the reason why all the three Commissioners met on the 17th to hear such applications as might be made in any ordinary action to a judge at Chambers. They had only power to act collectively, “unless,” added Sir James, “it be by consent.” The parties interested, however, consented to Sir James Hannen dealing by himself with

those preliminary matters which were not disposed of on the 17th September. The Commissioners adjourned until 11 o'clock on Monday, 22nd October.

* * *

THE force of habit is strong. In giving the decision of the Commissioners as to the discovery of documents, Sir James Hannen throughout alluded to them as "the Court."

* * *

AT Glasgow Circuit Court, a stalwart policeman deposed to having met two housebreakers about one o'clock in the morning, one of them carrying a bundle, which contained their booty. Counsel for the prisoners, on rising to cross-examine, completely staggered the worthy constable by his first question: "What were you doing out at that time of night?" Obviously the shady character of his habits had apparently not struck the constable before; but he seemed impressed with this new point of new.

* * *

To all appearance there is no scarcity of law reports across the Atlantic; and the announcement of a new series strikes something like panic into the hearts of the legal practitioners. Says the *Albany Law Journal* for September: "Another burden is about to be laid upon the back of the long-suffering legal camel, in the form of a new set of reports of the Lower Courts of this State, to be issued by the West Publishing Company." Alluding to the same subject, the *American Law Review* writes very wrathfully: "No collection of cases," remarks that journal, "can be raked together in English-speaking Christendom which contains such an amount of contradictory, confusing, and ill-digested trash as the reports of the intermediate Courts of the State of New York. In addition to the fact that these decisions are not final, and that many of them continue to be quoted as authority after they have been reversed upon appeal, it may be said that the Courts whose decisions they are, are composed of elective judges; that in New York city some of them have been in times past notoriously corrupt; that some of them have been impeached; and that as the price of their candidature for their offices on the party ticket they are assessed, and made to pay a sum of money so large, that they literally buy their offices. This is notorious the country over. This supplement is not issued on account of any intrinsic value in the reports of the cases which are reported, though many of them are good cases; but it is issued merely as a money-making scheme, in deference to the fact that New York is a great State, and that in a Bar so numerous, subscribers enough can be obtained to float such a concern, and make it pay. It would have been a Godsend to the profession outside of the State of New York if the reports

of Barbour, Howard, Abbott, Lansing, and Hun had never been inflicted upon them. There are many able and excellent judges in these Courts, especially in the country departments, and there are undoubtedly good decisions in these reports, and many of them; but life is too short to winnow the wheat from the abominable chaff."

* * *

Barristers and Solicitors.—An old subject has once more been revived for a moment, and has once more died its usual and inevitable death. An English solicitor—conspicuous for the manifestly Biblical tastes of his parents in the matter of nomenclature, for he himself is named Mr. Joel Emanuel—has written a pamphlet on "The Fusion of the Barrister and Solicitor Branches of the Legal Profession." We should not, in all likelihood, have considered it requisite to refer to this fact by itself. Moreover, we confess that we have not had an opportunity of reading Mr. Emanuel's tract. But the tract having been sent to a very high authority,—a very high political authority,—that statesman wrote a letter of acknowledgment. This, if the other did not, momentarily revived the subject, as we have said. The letter expresses the writer's disapproval of "the present severance between barristers and solicitors." It further states that the writer of the letter has "always considered the solicitors of high class to be amongst the most valuable members of society." With this last opinion we most heartily agree. So, we feel certain, will our readers. But we cannot share the illustrious statesman's disapproval of the present separation between the two branches of the profession. On the contrary, that separation seems to us not only most expedient, but quite indispensable, if the legal profession is to be fully efficient. That this is the opinion of the vast majority of the thinking men of the country, each one's personal experience amongst those with whom he comes into contact will show. The value of solicitors as members of society, which is justly extolled in the letter referred to, is largely the result of the very severance which the latter condemns. Their specialization, together with their personal character, accounts for the usefulness of high-class solicitors. To attempt to suggest that solicitors are an oppressed class, that the separation of the two arms of the profession is a grievance to the one rather than to the other, is preposterous. It is not the case of a lower and a higher, of inferior and superior. The barristers are not the supercilious engine-drivers, and the solicitors the humble coal-begrimed stokers. That is not an analogy at all. The two departments of practitioners are co-ordinate. It is a fair case of the application of the principle of division of labour, with the immense advantages accruing from such a principle. It is, besides, the silent result of experience, all the more reliable in

that it has been a result, as it were, unconsciously reached. Need we recall the three advantages of the division of labour pointed out by Adam Smith? The improvement in the dexterity of the workman, is one; the saving of time commonly lost in passing from one sort of work to another, is a second; the greater likelihood of the invention of machinery (and there is a machinery in law as well as in other crafts) for facilitating and abridging labour when the whole attention of men's minds is directed towards a single object, than when it is dissipated among a great variety of things, is the third. And still a fourth advantage of the division of labour has been pointed out since Adam Smith wrote, and it is even more clearly observable in the case of the legal profession than the first of the three we have mentioned. It is this: that the application of the principle to any pursuit admits of the workman being employed solely upon the work which he can do best. These all are old truths, well known, and therefore little heeded, by controversialists. But their force will be appreciated, their validity will be at once conceded, by any one who has a personal acquaintance with both barristers and solicitors. That pleaders, consulted lawyers, conveyancers, factors, etc., will acquire dexterity by the special devotion of their attention to their several departments, one must shut one's eyes not to see. The long-deferred maturity of to-day means nothing else; the handiwork of leaders in these branches is a record of it. Then who can fail to observe amongst his legal acquaintance that one man is naturally fitted for a solicitor; that another is naturally unfitted for a solicitor, but well suited for a barrister? Practice in America disproves the theory of our would-be reformers at home. Their specialization is as general as here; and there is as sharp a severance of work between the pleading partner and the chamber partner of an American firm of attorneys, as there is between a solicitor in Britain and his standing counsel. And there is a further application, a most important one, of the principle of improved dexterity in work from exclusive attention to one branch. An American magazine only last month contrasts English judges with American judges, and sadly admits the fact, that "A Bar educated (or uneducated) as ours is, will never recruit a judicial bench . . . with judges equal to those of England." It would have specialization in training from the first. At the Lord Mayor's banquet to the judges in London recently, the Attorney-General, in responding to the toast of "The Bar," said that during the last few months an idea had been revived which had found some support—namely, that it was desirable that the Bar of England should abandon some of its ancient responsibility, duties, and privileges, and become part of, or take into its ranks, another body. Nothing, in his opinion, would be more disastrous to suitors and to all whose interest it was that the law should be administered straight-

forwardly and uprightly by both advocates and judges, and nothing could be more disastrous to the Bar. It would be out of place for him on that occasion to enter into any arguments, but he might be allowed to say that he considered it of the highest importance to the study and practice of the law, that there should be a body of men who devoted themselves to nothing else but pure advocacy and the advising of clients.

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THE following occurs gravely and without comment in an American Digest of recent cases published in August last. It has been "recorded for a precedent."—*Trial*.—Misconduct of prosecuting attorney placing weapons on a table in view of a jury.—On a trial for murder, the prosecuting attorney placed upon the table a bowie-knife, pistol, and a coat of mail, which had no bearing on the case, and were not offered in evidence, nor was the attention of the Court called to them, or requested to rule or charge with reference to them. *Held*, not sufficient ground for reversing the judgment.—*People v. Cox*, Sup. Ct. Cal., 18 Pac. Rep. 332.

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THIS decision of momentous importance and, we should imagine, of universal interest, is also from America:—" 'Taffy-Tolu' is not a good trade mark for chewing-gum.—*Coegan v. Dunheiser*, 35 Fed. Rep. 150."

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A Suggestion to Reporters and Authors.—It is strange that reporters and legal authors have never had the practical sense to put at the top of each left-hand page the name of the reports, together with the volume, so that the practitioner can accurately cite the case without turning the book over to look at the back. But two or three instances are known where reporters and authors have had the sense to do this.—*American Law Review*.

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THE following advertisement is at present to be found in the law publications and catalogues of Italy:—" *Giacomo Muirhead. Storia del Diritto Romano dalle origini a Giustiniano* (corso completo ad uso delle Università). Traduzione del Dottor Luigi Gaddi con prefazione del Prof. Pietro Cogliolo." We understand that Professor Muirhead's great work has already a large circulation in the native land of the subject with which it so ably and exhaustively deals.

Obituary.

THE HONOURABLE LORD CRAIGHILL.

It is much to say of a judge who never was afraid to do his duty, but it can be said of the late Lord Craighill, that amongst the members of the legal profession with whom he came in contact there could not be found one who has not a kindly remembrance of him. Through all the abundant opportunity for friction which the daily work of a law court affords, his patience, his courtesy, and his good-humour were unfailing. Petulance or hastiness he never showed; but was invariably considerate. Of all judicial reputations to leave behind one, this is probably the most enviable. Lord Craighill, however, will be remembered besides as a successful judge. While by no means of outstanding ability, and having no gifts of the brilliant and dazzling kind, he nevertheless was characterized by qualities which are invaluable in a judge, and which rendered his career very serviceable to his country. In the traditions of the Scottish Bench he will bear a reputation for colossal industry and a highly conscientious and painstaking performance of all his work. His lordship never grudged undergoing any amount of trouble and plodding effort in order to sift out the truth. He would apply himself with laborious thoroughness to the most formidable mass of details. It must, of course, be acknowledged that this energy in many cases appeared to be unneeded, and that in his perhaps too elaborate and too wordy judgments much curtailment might often have been advantageous. But these are insignificant faults, and it is perhaps hypercritical to allude to them at all. The mental qualities and the extreme conscientiousness of which they were the outcome were admirable, and call for high praise. Lord Craighill's decisions always displayed not only fastidious care, but sound common-sense. He had at all times the courage of his opinions, and showed a sturdy self-reliance. A man could be sure that all that could be urged in his case would here receive full attention and be carefully considered. These are great qualities in a judge; and Lord Craighill's death is a heavy loss to our Bench.

The same unflagging industry, the same capacity for sterling hard work, characterized the deceased judge throughout his career at the Bar. These were his weapons. It was with them that he fought his way arduously, slowly but surely achieving substantial success. John Millar was called to the Bar in 1842, when 25 years of age. He was the son of a Glasgow merchant, and had received his education partly at Glasgow and partly at Edinburgh Universities. He was made Advocate-Depute in

1858, an office to which he was again appointed in 1866. In 1867 he became Solicitor-General for Scotland, and he held that office until December 1868. In 1874, when the Conservative Government returned to power, Mr. Millar was again appointed Solicitor-General. After thirty-two years' practice, he was raised to the judicial bench in 1874, assuming the courtesy title of Lord Craig-hill—the last instance, we believe, of a *territorial* courtesy on the Bench. His lordship has thus been fourteen years on the Bench. His death, which occurred on the 22nd September, was preceded by an illness of some duration, which had laid him aside from active work for a few months.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF RENFREW AND BUTE.

Sheriffs NICOLSON and MONCREIFF.

KELLY v. KENNEDY.

Reparation—Damages—Employers' Liability Act—Liability at common law—Acquiescence in known danger incidental to employment—Fault of fellow-workmen—Duty of employers and their foreman for safety of workman:—Held, (1) that the action of two workmen, which resulted in fatal injury to the pursuer's son, was not performed under the orders of the defenders' gaffer; (2) that the action was not caused by negligence on the gaffer's part, rendering the defenders liable in damages; observed, (3) that the proof falls short, though not by much, of establishing the existence of a practice on the part of defenders' workmen of the action which had the fatal results condescended on, or the gaffer's knowledge of and acquiescence in the action by the two workmen on the occasion in question, and that pursuer's failure to establish such practice, knowledge, and acquiescence may be due to the absence of material witnesses whose attendance she could not secure.

This was an action at the instance of Helen Kelly, Dungivan, Ireland, against Hugh Kennedy & Sons, contractors for the construction of a portion of the Caledonian Railway Company's new line between Greenock and Gourrock, for the sum of £300, as compensation, damages, and solatium under the common law, and also under the Employers' Liability Act, 1880, for the death of her son, James Kelly, labourer in defenders' employment. The leading facts of the case are very fully and accurately stated by the Sheriff-Substitute and the Sheriff in their respective interlocutors and notes thereto. The pursuer pleaded:—

(1) The said James Kelly being put to work in the bottom of the tunnel, and being entitled to rely that the defenders would have him well protected from all danger from the operations of those working

above on the scaffold, by having the shoot above him sufficiently fenced off, watched, and protected, and that they would have the platform, or staging, which formed the covering of the shaft, of strong and sufficient material; and the defenders having failed in their duty in all these respects, and the covering of the shaft being of unsound and insufficient material, and the "shoot" not being properly protected, the defenders are liable in law to compensate the pursuer for the death of the said James Kelly, her son. (2) The death of the pursuer's son, the said James Kelly, having been occasioned by the injuries received in the manner libelled, through the personal default of the defenders or of those acting under them, or of those for whom they are responsible, and through the insufficient and defective ways and plant in use by them as aforesaid, the pursuer is entitled to damages and solatium from the defenders for the loss and suffering thereby occasioned, with expenses. (3) The pursuer's son having received mortal injuries through the negligence of the foreman or superintendent of the defenders, in the exercise of the duties entrusted to him, the pursuer is entitled to compensation from the defenders, with expenses.

The defenders pleaded:—

(2) The deceased not having been injured and killed through the fault of the defenders, or of those for whom they are responsible, decree of absolvitor should be pronounced, with the costs. (3) The injuries and death of the deceased being due to the fault of a person engaged in a common employment with deceased, the pursuer is not entitled to claim compensation from their common employer in respect thereof. (4) The deceased having elected to work in connection with mining or tunnelling operations, undertook the ordinary risk incidental to such employment; . . . and (6) The deceased having entered on a seen or known danger without objection, the defenders are not liable in the consequences thereof, and should be assolizied, with costs.

On 18th April 1888 the Sheriff-Substitute (Nicolson) pronounced the following judgment:—

"*Greenock, 18th April 1888.*—The Sheriff-Substitute, having heard parties' procurators, and considered the closed record, proof, and production, Finds that the pursuer's son, James Kelly, was engaged as a labourer in the excavation of a tunnel forming part of the defenders' contract with the Caledonian Railway Company for the construction of the chief portion of a branch line between Gourrock and Greenock; that his work was at the bottom of the tunnel under a scaffolding about forty feet long, twenty-six feet broad, and ten or twelve feet high; that near the inner end of the scaffold there were two openings or 'shoots,' about thirteen feet long and three-and-a-half feet broad, the inner one of which was used for sending *debris* to the bottom, the other for sending up bricks from below for the bricklayers on the scaffold; that when these 'shoots' were not being used they were generally covered over with boards for the protection of the men below from stuff falling from above; that on 24th August 1887, about 9 P.M., Alfred Wilmore and James Wilson were working on the scaffold, and had to carry a heavy prop from the one side to the other; that they took a short cut across the

outer 'shoot;' that a board on which they stepped over gave way, precipitating Wilson and the prop to the bottom; that the prop fell on Kelly, and inflicted mortal injuries of which he died on 27th August; that in crossing the shoot Wilmore and Wilson were not acting under the orders of their gaffer, Job Credde; that the accident was not caused by negligence on his part, rendering the defenders liable in damages: Assolizies the defenders from the conclusions of the action; finds no expenses due to or by either party, and decerns.

(Signed)

"ALEX. NICOLSON."

In a note his lordship says:—"From the conflict of evidence in this case about matters of easy observation, not only between the two sides, but between the witnesses on both sides among themselves, I have found it more difficult than usual to arrive without doubt at finding in fact. The absence, also, of the three men whose evidence would have been the most important—Credde, Wilmore, and Wilson—is remarkable and unfortunate. The immediate cause of Kelly's death is beyond doubt. He was knocked on the head by the prop of wood which Wilson and Wilmore were carrying across the shoot above him. The proximate cause of the accident, I have no doubt, was the breaking of the board on which Wilmore stepped across, but which gave way under Wilson, and went down with him and the prop to the bottom. The question is, Who put it there? It is described in the pursuer's condescendence as 'a plank or board of the platform,' and the defenders in their answers call it 'a plank or piece of wood.' It was neither a part of the platform nor a plank, but a simple board of pitch pine between three and four feet long, eight inches broad, and an inch to an inch and a half in thickness. That is the description of Connon, the only witness who examined the broken board soon after it came down. It was in fact one of the 'polling boards' used for boarding up the arch of the tunnel, and not intended to be used for covering the shoot, still less to be walked upon by men carrying a heavy weight. The gaffer Credde had ordered a man to assist in lifting the prop on the shoulders of Wilmore and Wilson, but he gave no further directions. He was engaged at the 'heading,' and I cannot regard it as negligence on his part that he did not come to see the prop carried to the other side of the scaffold. It was not a difficult or dangerous operation, and did not require special supervision. There is no evidence that he knew Wilmore and Wilson were going to cross the shoot, or that he knew a board had been placed across it. There is no evidence as to who put that board where it was; and though the defenders say (Answer 7) they 'have been informed and aver that on the occasion in question Wilson and Wilmore, or other of deceased's fellow-workmen, of their own accord, and without the knowledge or authority of the defenders, laid a plank or piece of wood, measuring about four feet long, fourteen inches broad, and one and a half inches thick, loosely and unsecured across said shoot, they did not produce any evidence in support of this averment. How they were able to condescend so exactly in the dimensions of the 'plank' or 'piece of wood,' which was not produced, and seems to have disappeared the night of the accident, is surprising. That solitary board could not have been placed where it was for the protection of the men below, which was the ordinary purpose for

covering the shoot. It could have been meant only for bridging the shoot, and the probability is that it was so placed by Wilmore and Wilson. It is not probable that Credde either ordered or allowed it to be put there. The crossing of the shoot must have been regarded as a short cut across the scaffold, but there was nothing to hinder Wilmore and Wilson from going round the shoot instead. The model produced by the pursuer, and the plan produced by the defenders, instead of making the case more plain, have made it more difficult for me to understand how it could have been considered any advantage to cross the shoot, but it was so considered by Wilmore and Wilson. These men, before venturing across the shoot with the prop, ought, for their own safety and that of the men below, to have examined the board or boards (Connon says two came down) on which they were going to cross, and if it seemed to them defective or weak, they could easily have got one or more planks of sufficient strength. They did not do so, and they alone therefore seem to blame for the accident. If they themselves, without authority, placed the boards for the purpose of crossing upon it, their blame is the greater."

The pursuer appealed, and on 19th June 1888 the Sheriff pronounced the following interlocutor:—

"The Sheriff having considered the reclaiming petition for the pursuer, and answers for the defenders, together with the proof and process, Appoints the parties to state, within six days, whether they, or either of them, desire to examine, as witnesses in the cause, the men Wilson, Wilmore, and Credde mentioned in the record and in the proof.

(Signed) H. J. MONCREIFF."

"*Note.*—The proof in the case is very unsatisfactory in several particulars, and especially in the absence of the evidence of the workmen Wilson, Wilmore, and the gaffer Credde, the persons who were able to give the most direct and material evidence in connection with the accident. Their disappearance is remarkable. The death of Kelly occurred on 27th August 1887, and the present claim was intimated on 14th September of the same year. Between these dates it appears, from the answers for the defenders to the reclaiming petition (p. 26), that these men were examined in regard to the accident, and that the averments made in the defences (Ans. 7) were made on the strength of the information so obtained, and yet between the date of that examination and 14th September these men left the defenders' employment, and have disappeared and left no trace. I think it is desirable that if it is possible these men should even now be produced, and I have therefore given the parties an opportunity of stating whether they wish and are in a position to procure their attendance. The parties will know whether they have exhausted all reasonable means of ascertaining their whereabouts, and if they have, of course, I must dispose of the case as it stands.

(Intd.) H. J. M."

The defenders by minute moved for the examination of the foreman, Job Credde, and by minute pursuer intimated her desire to have the evidence of the whole three witnesses; but while she had discovered Credde, she *inter alia* explained her inability to ascertain the whereabouts of Wilson and Wilmore. The Sheriff then pronounced the following interlocutor:—

"*Edinburgh, 28th June 1888.*—The Sheriff having considered the minutes for the pursuer and defenders respectively, Nos. 16 and 15 of process, Recalls *in hoc statu* the Sheriff-Substitute's interlocutor of 18th April 1888: Allows the parties, or either of them, to examine as witnesses in the cause, Wilson, Wilmore, and Job Credde, referred to in the proof: *Quoad ultra* refuses the crave of the pursuer's minute: Grants diligence against witnesses, and havers. . . .

(Signed) H. J. MONCREIFF."

After hearing the evidence of the gaffer, the Sheriff pronounced the following interlocutor disposing of the case:—

"*Edinburgh, 11th August 1888.*—The Sheriff having resumed consideration of the appeal, and considered the debate on the additional proof, together with the whole process, Dismisses the appeal, and affirms the interlocutor appealed against: Finds no expenses due to or by either party, and decerns.

(Signed) H. J. MONCREIFF."

In a note his lordship says:—"On the evidence before me I feel constrained to hold that the pursuer has failed to prove her case. I take it to be admitted or proved that the deceased James Kelly was killed by a heavy prop falling upon him through the outer portion of the shoot in question; that the prop fell upon him in consequence of two fellow-workmen, Wilmore and Wilson, attempting to carry it across a plank laid across the said shoot; that the said plank either broke owing to its not being sufficiently strong, or slipped owing to its not being properly secured; and that James Kelly in no way contributed to the accident. It may also be taken as admitted that it was an improper act for workmen to cross the shoot on a board of the kind. The crucial question, which is not exactly that raised on the record, is whether the gaffer Credde was in fault in not preventing the men under his charge from crossing the shoot when it was not securely planked over, and when others were working below. In my opinion, the pursuer has failed to prove the existence of such a practice and Credde's knowledge of it, though her failure to do so may be due to the absence of material witnesses whose attendance she could not secure. In a note to a previous interlocutor I drew attention to the remarkable circumstance, that the three men who could have given the most precise evidence disappeared immediately before the action was raised, and I suggested that a search be made for them. Wilmore and Wilson have not been found, but Credde, the gaffer, was discovered in a very unexpected quarter—viz. in the defenders' employment. He has now been examined, and the statement of his movements is remarkable. He was precognosced at least twice immediately after the accident, which occurred on the 27th August 1887; he left the defenders' employment about 10th or 11th September, two or three days before notice of the pursuer's claim was given, and went, he says, to Wales. The proof took place on 1st November 1887, and it is stated for the defenders that with a view to adducing him as a witness an anxious search was made by them for Credde, but without success. It now appears that Credde returned to the service of the defenders five weeks before Christmas—that is, about 20th November 1887, only three weeks after

the proof, and he has remained in their service ever since. Lastly, and perhaps this is the strongest statement in his evidence, he declares that he did not hear of this action having been brought until the month of June last, 1888. Now, I think that, looking to the terms of the Sheriff-Substitute's note, dated 18th April 1888, which I presume was communicated to the defenders, in which he regrets the 'remarkable and unfortunate absence' of Creddle and others, the defenders should have informed their legal advisers of the fact that Creddle was, and had been, for months in their employment at the date of that interlocutor, and not have allowed them in ignorance of this to submit an agreement in the appeal, from which I certainly inferred that Creddle was still not to be found. But the serious question is, how far Creddle's admissions and statements above noted affect the rest of his testimony. I must say that it appears to me, sitting as a jury, that the inevitable inference is, that Creddle had something to conceal, and that he knows more than he has chosen to disclose. In particular, I cannot believe that he first heard of this case in June 1888, and that being so, I distrust his motives in suddenly leaving the defenders' service and returning immediately the proof was over; and I should be slow to believe him when he says that he did not see Wilson and Wilmore crossing the board. But while all this is suspicious and unsatisfactory, I must dispose of the case on the evidence as it stands; and, as I have said, I think it insufficient. I have read and re-read the proof, and without analyzing it I may say that, in my opinion, it falls short, though not by much, of establishing the existence of a practice on the part of the men of crossing the shoot on boards, or Creddle's knowledge of and acquiescence in Wilson and Wilmore doing so on the occasion in question. (Intd.) H. J. M."

Act. Walker—Alt. Cameron.

Notes of English, American, and Colonial Cases.

PRIVATE INTERNATIONAL LAW.—*Law of place—What law governs in case of oral order for goods.*—Where plaintiff, a dealer in Ohio, receives orally, in Michigan, an order for goods, which he ships, the contract is governed by the law of Ohio.—*Sullivan v. Sullivan*, Sup. Ct. Mich., 38 N. W. Rep. 472.

CONTRACTS.—*Affreightment—Conflict of laws—Private international law—Shipping—Carriers of goods—Negligence—Law and fact—Maritime law—Admiralty—Marine contract exempting from liability, by what law governed.*—A claim was made by an American citizen in the winding-up of a British steamship company for damages for the loss of his cattle through the negligence of the master and crew. The ship in which the cattle were carried was a British ship trading between Boston and Liverpool. The charter-party contained express stipulations exempting the company from liability caused by the negligence of the master and crew. The cattle were shipped at Boston, and bills

of lading were given there, in conformity with the contract. The ship stranded on the coast of North Wales through the negligence of the master and crew. According to the American law the stipulations were void, but according to English law they were good, and were usually inserted in English bills of lading. *Held*, that the stipulations were valid—first, because the contract was governed by the law of the flag; and secondly, because from the special provisions of the contract itself it appeared that the parties were contracting with a view to the law of England.—*Re Missouri Steamship Company Limited; Monroe's Claim*, Eng. Ch. Div., 58 L. T. Rep. (N. S.) 377; 37 Alb. L. J. 518.

NEGOTIABLE INSTRUMENTS. — *Actions* — *Set-off* — *When set-off not pleadable after assignment*.—Where the holder of a promissory note has acquired it for value, the maker cannot plead as a set-off a note acquired after the assignment for a merely nominal consideration.—*Procter v. Cole*, Sup. Ct. Ind., 17 N. East. Rep. 189.

INSURANCE. — *Accident* — *Proximate cause* — *Death from fright or nervous strain*.—While one insured against accidents was driving upon a public street, his horse became frightened at an unsightly object, and ran away, without upsetting the carriage or coming in contact with anything, and was at length brought under control; but the insured was apparently greatly endangered at the time, and suffered so severely, either from fright or strain caused by his physical exertion in restraining the horse, that he died within an hour afterwards. *Held*, that the death ensued from bodily injuries effected through external, violent, and accidental means. The clause which provides that the insurance shall not extend to any bodily injury of which there shall be no external and visible signs upon the body of the insured, does not apply to fatal injuries, but only to those not resulting in death; the clause proceeding, "nor to any death caused," etc.—*McGlinchy v. Fidelity, etc., Co.*, Sup. Jud. Ct. Me., 14 Atl. Rep. 13; 6 N. Eng. Rep. 450.

MARRIAGE. — *Divorce* — *Pregnancy before marriage* — *Presumption*.—Where a wife gave birth to a child three and a half months after the marriage, but no proof is given to rebut the presumption that the husband is the father, his petition for a divorce must be refused. The marriage, and birth of a seven or eight months' child within three and one-half months thereafter was proved; and it was shown by two witnesses that they were present at the marriage, and did not notice that the appellee was pregnant; and it was shown that the appellant lived with her as a husband until some time after the birth of the child, and then left her; but upon leaving, tried to persuade her to go with him. The Court below refused the divorce, and the plaintiff appealed. There was no proof as to who was the father of the child, and in such cases the presumption is that it is the child of the husband. (*Reynolds v. Reynolds*, 3 Allen, 605, 610; *Hemmenway v. Towner*, 1 *id.* 209; *Philips v. Allen*, 2 *id.* 453.) This presumption should be overcome by some proof to the contrary; but in this case the evidence tended rather to strengthen the presumption. The appellant and appellee associated together for a year before the marriage, and during a portion of the time were engaged to be married. There is no evidence to show that she kept company with any other man during that period, or that any one else was suspected of improper intimacy with her. After the

marriage; too the appellant lived with her as a husband for a considerable period, during which he must have known that she was with child, and must have known too that it had been begotten before the marriage. Yet he made no complaint or inquiry as to her situation, but acted in all respects as the father of the child would have done under like circumstances. Continuing to acknowledge such a person as his wife was almost proof positive that the child was his own, or that he believed, and had good reason to believe, this to be the fact. It is true that the appellant alleges that because of his youth and inexperience he did not know anything about such matters, and did not know that the child was not his until after it was born; but there is no proof on this subject, and the presumption from the allegation itself is that he believed the child to be his, until its appearance convinced him to the contrary. But the evidence showed that he tried to persuade his wife to go and live with him after the child was born, which tends to show that he still believed it to be his own. It is settled law that the husband cannot have the marriage annulled because the wife was with child by him at the date of the marriage. If a condition of pregnancy at that time is under any circumstance an impediment to marriage, it must be because it will impose upon the husband a spurious offspring. (*Reynolds v. Reynolds, supra.*) If, on the contrary, it yields him as the first-fruits a child of which he is the father, the contract cannot be annulled, as its object is in nowise defeated. All the rights and privileges to which the husband is entitled are secured to him, and he cannot complain of the consequences of his own misconduct, especially when it has done him no injury. These principles are abundantly supported by authority, and need not be further elaborated. See preceding authorities; also *Long v. Long*, 77 N. C. 304; S. C., 24 Am. Rep. 449. The presumption, strengthened by proof, being that the appellant was the author of the condition of the wife at marriage for which he seeks to annul it, and no proof to the contrary having been produced, we think he showed no grounds for divorce, and the Court below properly refused to grant his petition.—Tex. Sep. Ct., Feb. 10, 1888, *M'Cullough v. M'Cullough*.

MASTER AND SERVANT.—Where an agent, while engaged in his master's service of pursuing a criminal, illegally arrests another man, although he disobeys orders in further pursuit, the master is liable.—*Harris v. Louisville, etc., R. Co.*, 35 Fed. Rep. 116.

PERJURY.—Perjury must be proved, in Texas, by the direct testimony of two witnesses, or the direct positive testimony of one corroborated strongly by other evidence.—*Maines v. State* (Tex.), 9 S. W. Rep. 51.

A conviction for perjury in testifying that a hide claimed to have been taken from a steer alleged to have been stolen by A was taken by defendant and A from a dead cow, cannot be sustained on the testimony of a witness that he was at A's house on the evening of the day of the alleged theft, and found A and defendant skinning a beef that they had just killed, and that two days after he and another, who corroborated him, went to the house and found the hide of the stolen steer.—*Ibid.*

TRADE MARK.—Words descriptive of the character of a compound or

goods, rather than indicative of its or their origin, are incapable of appropriation as a trade mark by one having no patent for the exclusive use of the ingredients which constitute the goods, or for the goods themselves.—*Colgan v. Danheiser*, 35 Fed. Rep. 150.

The manner of packing and labelling chewing gum cannot be claimed as a trademark or trade name, unless it clearly appears that complainant was the first to introduce the goods in this particular way, and that defendant has attempted to supplant him in the market by an unlawful use of similar packing and labelling.—*Ibid.*

EVIDENCE.—*Competency*.—Evidence of quarrel between defendant, charged with murder, and deceased, which occurred several years before time of murder, and threats of defendant then made, is admissible to show malice; the remoteness only affects its weight.—*People v. Brown*, Sup. Ct. Cal., June 15, 1888.

In a charge of fornication, the jury, viewing the bastard and the putative father, may consider whether there is a resemblance between them.—*Gaunt v. State* (N. J.), 12 Cent. Rep. 789.

CARRIERS.—Contract by which express messenger is exposed to substantially the same risk as those to which railroad baggagemen are regularly exposed, including that as to negligence of the company's servants, is not unreasonable nor against public policy.—*Bates v. Old Colony R. Co.* (Mass.), 6 New Eng. Rep. 583.

1. Passenger unprovided with ticket, and refusing to pay fare or leave the train, may be ejected by agents of carrier; but if more violence is used than necessary for that purpose, the carrier and its agents are liable for damages.—*Jardine v. Cornell* (N. J.), 12 Cent. Rep. 804.

A police officer assisting in ejecting the passenger at the invitation of the agent of the carrier, is subject to the same rule in regard to excessive violence.—*Ibid.*

If such passenger is a disorderly person, the policeman may arrest him by virtue of his office; and for violence incident to such arrest, the carrier or its agents are not liable.—*Ibid.*

2. Where a passenger is pulled from a car against her will by one of the carrier's servants, the carrier is liable for all ill effects which naturally follow the injuries, in the condition of health in which the passenger was at the time.—*Owens v. Kansas City, etc., R. Co.* (Mo.), 15 West Rep. 88.

It is no defence that by reason of latent disease the injuries were rendered more serious to her than they would have been to a more robust person.—*Ibid.*

3. Where passenger is injured by leaving car in attempt to escape from apparent danger, it must appear that that which produced the alarm was the carrier's negligence.—*Chicago, etc., R. Co. v. Felton* (Ill.), 15 West Rep. 41.

Passenger has the burden of proving this negligence, and it is not done by proof that peculiar signal, which was a proper one, was given by the engine, which caused or aggravated his alarm.—*Ibid.*

Where train, during night time, was stopped by a snow drift, and some of passengers, alarmed by approach of snow plough upon adjoining track, apprehending it to be upon main track, upon whistle being sounded by locomotive on their train, left the car, and while

crossing the adjoining track were injured by the snow plow, the carrier is not liable.—*Ibid.*

PHYSICIANS AND SURGEONS.—*Malpractice—Evidence—Evidence of fraud in procuring diploma immaterial.*—In an action against a physician for negligence and incompetency in the treatment of plaintiff, evidence that defendant procured his certificate of proficiency from the State Board of Examiners without examination, by means of diplomas irregularly obtained from medical schools, is irrelevant, as are also defendant's statements concerning such diplomas; the only question being as to the degree of care and skill used in the particular case.—*Bute v. Potts*, Sup. Ct. Cal., 18 Pac. Rep. 329.

ASSAULT AND BATTERY.—Where defendant, with his family, was grossly insulted by the injured party, and on the following morning, calling the latter to account, is struck by him, and, considering his life in danger, he struck him on the ear with a revolver, and it went off accidentally, he is only guilty of assault and battery.—*People v. Lennon* (Mich.), 15 West. Rep. 350.

HUSBAND AND WIFE.—Cohabitation by married man with woman other than his wife, when there is no presumption of the death of his wife, is adultery, and deprives him of right to divorce for desertion by wife.—*Whippen v. Whippen* (Mass.), 6 New Eng. Rep. 674.

DRUNKENNESS.—An innkeeper is not indictable for being drunk in his own inn, unless it becomes a nuisance, and is so charged in the indictment.—*State v. Locker* (N. J.), 13 Cent. Rep. 266.

BANKS AND BANKING.—Where the receiving teller of a bank, a few minutes before the bank closed its doors, receives a deposit, and, not knowing of the coming failure, after crediting the money in depositor's passbook, puts the money and deposit ticket one side, and the bank closes its doors before entry is made in its books, and the money is placed apart and delivered to the receiver, replevin is maintainable for the money so deposited.—*Furber v. Stephens*, 35 Fed. Rep. 17.

MALICIOUS PROSECUTION.—Evidence of statements of third parties to defendant of their belief that plaintiff had committed larceny, will not justify prosecution therefor.—*Norrel v. Vogel*, Sup. Ct. Minn., July 3, 1888.

Advice of counsel is no defence where defendant did not inform the attorney of some of material facts. Where plaintiff, before prosecution, requested defendant to examine supposed stolen property in his possession, which he refused to do, this was a material fact which should have been stated to the attorney from whom defendant sought advice.—*Ibid.*

CRIMINAL LAW.—*Larceny—What constitutes asportation.*—Evidence that defendant was found in possession of an overcoat taken from a dummy figure on a sidewalk, but still fastened to it by a chain through the sleeves, does not show larceny. "Larceny," as defined in the Penal Code of this State, "is the felonious stealing, taking, carrying, dealing, or driving away the personal property of another." This is substantially the common-law definition, under which it was held that it must be shown that the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment. Thus where goods were tied by a string, the other

end of which was fastened to the counter, and the thief took the goods and carried them toward the door as far as the string would permit, and was then stopped, this was held not to be a severance from the owner's possession, and consequently no felony. (3 Greenl. Ev., § 155.) "In the language of the old definition of larceny," says Bishop, "the goods taken must be carried away. But they need not be retained in the possession of the thief, neither need they be removed from the owner's premises. The doctrine is that any removal, however slight, of the entire article, which is not attached either to the soil or to any thing not removed, is sufficient; while nothing short of this will do." (2 Bish. Crim. Law, 794.) The Attorney-General admits that this is the doctrine of the English cases. In *Stale v. Jones*, 65 N. C. 395, the Court says:—"There must be an asportation of the article alleged to be stolen, to complete the crime of larceny. The question as to what constitutes a sufficient asportation has given rise to many nice distinctions in the Courts of England, and the rules there established have been generally observed by the Courts of this country."—Cal. Sup. Ct., March 28, 1888, *People v. Myer*. Opinion by Sharpstein, J.

NEGLIGENCE.—Where a mining company threw out a pile of slack on its own ground, which caught fire and finally sank to the surface of the ground, so that it had the appearance of being ashes, while in fact there were live coals underneath it, and a twelve-year-old boy, who was a mere trespasser, being threatened by some miners, ran across the slack, supposing it to be nothing but ashes, and was severely burned, the company is not liable.—*M'Donald v. Union Pac. R. Co.*, 35 Fed. Rep. 38.

DAMAGES.—*Personal Injuries—Duty to procure proper medical treatment.*—Where defendants ask a special charge that "if plaintiff's knee-cap could have been cured by having an operation performed which would not have been dangerous, it was his duty to do so, and that he would only be entitled to recover for sufferings up to the time he could have been cured;" and the Court charged, that "if the plaintiff by his own negligence, after receiving his injuries, aggravated them, he could not recover for the aggravated injury, and that it was the duty of the plaintiff to use ordinary care and prudence to cure his injuries as speedily as practicable, considering all circumstances; and if he was negligent in this duty, he would be entitled only to such damages as he would have sustained had he so performed his duty"—the latter charge is sufficiently explicit, and there is no necessity for special charge. The evidence of experts was conflicting as to the expediency and result of an operation removing the dead bone in the knee-cap, some contending that it was indicated, and ought to be done, and the sooner done the better; that when done, the issue would stop and the wound heal, but the knee would be weakened. Others declared in favour of conservative surgery—that is, to give it a chance to heal itself if it would—and that an operation might result in a stiff joint, or necessitate amputation of the leg. All the surgeons and physicians agreed that such results were improbable. It was the duty of plaintiff to have had an operation performed on his knee if it could have been done without danger, and with assurance that it would be benefited. He was only required to act as a man of ordinary intelligence and prudence would

have acted under the circumstances.—*Kluttz v. Railway Co.*, 75 Mo. 642; 1 Suth. Dam. 148. Tex. Sup. Ct., Feb. 7, 1888, *Gulf, C. & S. F. Ry. Co. v. Coon*. Opinion by Collard, J.

CRIMINAL LAW.—*Homicide—Insanity—Declarations of defendant—Instructions—Evidence.*—(1) Upon trial for murder, where insanity is relied upon as a defence, statements of defendant, made to physician six weeks after the killing, as to his condition at the time of the homicide, are inadmissible in evidence. (2) Upon trial for murder, the evidence for the State all tending to prove deliberate and premeditated killing, while the prisoner claimed it to have been upon sudden impulse, the Court, after correctly instructing as to the distinctions between the different degrees of murder, referring to the various dispositions of men, said that some were of a considerate nature and others more prone to violent passion; the minds of some more active, enabling them to reach conclusions quicker than those of more sluggish temperament; and it was therefore for the jury to say whether in the particular act there was deliberation sufficient to make it murder in the first degree; that it was essential that some thought or reflection should precede the act before it could be called deliberate, but that if there was such thought or reflection, followed by determination, that was deliberation within the meaning of the law; and if they believed the evidence of the prosecution, there was deliberate premeditation of the crime, but that if they believed the defendant's testimony, it was in the opinion of the Court a case of murder in the second degree, but that it was a question of fact for the jury to determine. *Held*, correct. (3) Defendant, on the night of the killing, got a horse and buggy, and, misrepresenting his destination, drove to the house of deceased, who was his mother, invited her to ride with him, and while out driving, shot her, carried her body some distance, took it from the buggy, and placed it by the roadside. The next morning he threw his pistol into a pond, told no one of what had been done, and misrepresented where he had been the previous night, until the evidence pointed clearly toward him, when, without manifesting remorse, he made a confession, in substance as his testimony on the trial, which was to the effect that the killing was upon sudden impulse arising from provocation. *Held*, that the evidence justified the verdict of guilty of murder in the first degree.—June 5, 1888.—*People v. Hawkins*. *New York Court of Appeals*. Opinion by Danforth, J.

THE JOURNAL OF JURISPRUDENCE.

THE MURDERS IN EAST LONDON.

UP to the time of our going to press, the perpetrator or perpetrators of that series of murders known as the Whitechapel Tragedies, are still at large, and, so far as public information goes, no important clue to his or their whereabouts has been found. The London populace has displayed its habitual characteristics in connection with these crimes. There has been the usual unreasoning panic—excusable, perhaps, among the wretched women who belong to the class from which the several victims have seemingly been chosen; barely excusable, too, on the part of people who reside in the districts where such daring assassinations have occurred; but surely in no degree to be justified in the case of the educated and reasoning citizens at large, or in the case of any section of the metropolitan press. On the subject of the murders the London public has produced a greater quantity of egregiously foolish utterances, in the different shapes of rumour, comment, and so-called suggestion, than could well have been collected from a similar number of people in any part of the world. It has also, as a matter of course, blamed the police; while at the same time it has, doubtless with the best intentions, done probably as much as in it lay to increase the difficulties in the way of detection. All this was to be looked for. It constitutes one of the most formidable difficulties with which the police are confronted in a case of the kind. And it is hardly to be wondered at, in the circumstances, that many of those engaged in the detection of crime should be willing to dispense with the slight assistance which is to be gained by partially taking the public into their confidence, since it is so disproportionate a compensation for what is thereby lost.

The fact, however, that the murderer or murderers have still to be tracked out, is an instructive one. For several weeks all the skill and all the effort of a great system of police have utterly failed to connect any one with a series of atrocious murders, committed not in solitary places, but in one of the most densely

populated districts of London; not in the recesses of some lonely wood, but on the public streets of the largest city in the world. The murderer has succeeded in avoiding suspicion during all that time. No doubt the very immensity of the population may be an element of safety to the guilty person in such a case. If he once get clear of the immediate vicinity of his victim, concealment and escape are obviously more easy amid such a throng—even should he have been momentarily seen in suspicious circumstances. But should no one have seen the deed, and should no one have seen the murderer near the spot even for a moment, it is not unlike the proverbial looking for a needle in a haystack to begin to seek for him among some hundreds of thousands of men, not to mention the watching of all the countless egresses from the neighbourhood. Yet, after making due allowance for these considerations, it is surprising that in the present cases there has been a failure to discover the perpetrator or perpetrators of the deeds. For they have not been ordinary murders. They have not been simple in their character, or bare of particulars. Not only are the details as revolting as any which the records of medical jurisprudence contain; they are also marked by certain characteristics which, at first sight, would seem to afford a peculiarly strong likelihood of the crimes being cleared up. The very number of the crimes; the almost exact repetition of the murderer's procedure in each; the similarity of hour and circumstance; the elaborate mutilation of the bodies; the selection of victims from one sex and class only, and the like,—these things might not unnaturally be expected to give some clue. Yet this abundance of circumstances gives none. That all these facts will be strong links in the chain of circumstantial evidence hereafter is almost certain. But something further must first emerge before they can be of use in connecting a criminal with the crimes. So far from giving a clue, they would seem to conspire to baffle the police,—who, to judge from indiscriminate arrests and wholesale search, are not yet on the track.

It may not be amiss to consider for a little some of the peculiar features of these murders, in view of the theory which has been put forward and widely favoured, that they are the handiwork of a homicidal maniac. Without at all prejudging the case, we may discuss shortly how far the facts give colour to this explanation, and how far they consist with alleged instances of this monomania, —the *monomanie meurtrière* of the French alienists.

In so far as possible we shall, in these few remarks, avoid touching on the question of the reality or non-reality of what is known by the various names of Affective Insanity, Moral Mania, and, in the language of Pinel, who first maintained its existence, *Manie (ou Monomanie) sans délire*. This derangement is defined by Pritchard as consisting in “a morbid perversion of the natural feelings, affections, inclinations, temper, habits, and moral dis-

positions, without any notable lesion of the intellect or knowing and reasoning faculties, and particularly without any maniacal hallucination" (Cyclop. of Practical Med., art. Insanity, p. 825). The reality of such a state has been maintained, though with certain qualifications, by such distinguished alienists as Pinel, Esquirol, Georget, Gall, Marc, Rush, Reil, Andrew Combe, Conolly, Pritchard, Pagan, Ray, and Professor Maudsley. Yet many call that reality in question, and deny the existence of an irresistible criminal impulse in minds otherwise sound. "Public writers and lawyers," says Dr. Maudsley (Responsibility in Mental Disease, p. 150, 3rd edit.), "naturally jealous of the application of the doctrine to excuse crime, have rejected and reviled it as a dangerous and absurd medical crotchet; having been probably the more moved to do so because they perceive that, if it be admitted, they will be impotent, by reason of their ignorance of insanity, to put a proper check upon its application." It is better not to expose oneself to the reproach of this too keen controversialist in a place where there is not space to defend one's position. So we pronounce neither on the one side nor the other. M. Breschet remarks that the line of demarcation between depravity and madness is very difficult to draw. This is sufficient for us. It is also the gist of the matter. For, admitting for the moment the existence of a pathological phenomenon of a perversion of the affections without a derangement of the intellect, there is a further question—not to be settled off-hand by mere generalities. Ought such a form of mental disorder to involve irresponsibility for crime in the same way as intellectual disorder? Even Professor Maudsley shrinks from answering this universally in the affirmative, and considers the admission of a modified responsibility, according to the special circumstances of the case, to be "the truest justice."

It was the very atrocity of the Whitechapel murders that gave rise to the theory of their being the work of a madman. It is not a novel line of reasoning, this. Georget, when dealing with the notorious case of Antoine Léger, who was tried in 1824 for the violation and murder of a girl of twelve, remarks: "*Plus un crime est inouï, a dit un juriste (je ne sais lequel; . . .) moins il faut en chercher la cause dans les mobiles ordinaires des actions humaines.*"—"The more strange and unheard of a crime is, the less need one seek for its cause among the ordinary motives of human actions." Only let the deed be surpassingly barbarous, and the ordinary mind will at once leap to the conclusion that it was a maniac who wrought it. Its very wantonness and shocking brutality are considered inexplicable on any other hypothesis save that of an unhinged and disordered mind. Now the inference is quite fallacious. There are many extraneous considerations to be kept in view, as, for example, that the mutilation may be a mere ruse in order to mislead the investigators, or even, should the

culprit look so far ahead, to give colour to a plea of insanity when things reach that pass. But putting such aside for the present, it is rash to conclude that there is any limit to the depravity of human nature. From this ground of sheer brutality by itself, no inference of madness ought ever to be drawn. Some of the most barbarous murders on record have been perpetrated by admittedly sane men—men on whose perfect soundness of mind no doubt has ever been cast. Nor is it to be forgotten that an ordinary execution in this country of ours in bygone times was certainly not inferior in savagery to these London outrages. Disembowelling, and plucking out the heart while the victim still breathed, and quartering after death, were regular practices, sanctioned by public opinion, ordained by men whom we still count enlightened. It cannot be pretended that these, continued for centuries, were evidences of insanity on the part of the people who permitted their infliction. They were evidences of the base and brutal side of human nature—sane and sound human nature—which it is the function of criminal law to repress. Uncivilised savages, too, of our own time, still revel daily in atrocious cruelties, even to hear of which makes one shudder. Yet we do not stamp these races as universally mad and irresponsible. No more is mere barbarity, when displayed in our own time and country, to be regarded as necessarily a symptom of mental derangement, or of anything but great depravity. The mutilation of the bodies of these wretched women in East London, taken by itself, is no indication whatever of insanity on the part of the perpetrator or perpetrators of the deeds.

It is said that the hypothesis of insanity as an explanation of these startling crimes, is borne out by the apparent absence of anything like an adequate motive. The circumstances certainly point to none. The existence of the customary motives to murder seems to be negatived by all that is known. The object cannot have been robbery or gain; the poverty of the murdered woman in each case negatives that. Assassination can scarcely have resulted from an impulse of sudden anger; the very number and similarity of the crimes negative such a possibility. As unlikely is it that the motive was a long-cherished revenge; the fact that the butchery was practised not on an individual or set of individuals, but on the members of a class (apparently on such members merely as chance threw first in the murderer's way) seems to negative that idea. The suggestion that the crimes were committed for the sake of obtaining from the bodies a certain organ, to be sold for scientific purposes, is, of course, untenable. The state of the market for such articles negatives the hypothesis. One fails to descry any motive. But this failure is no ground for inferring insanity, and it would be dangerous so to regard it. Apparent absence of motive is no criterion. No doubt in cases of alleged Kleptomania this element is of first importance. If a

person in comfortable circumstances financially, with the means even of giving charity to others, secretly fill her pockets with bread at the table of a friend (as in an authentic case recorded by Dr. Rush), certainly the absence of reasonable motive is all but conclusive of an irresistible propensity to steal. But in this respect the crime of theft stands absolutely alone. And even in the case of theft, were the article stolen anything but a commodity readily obtainable in quantity by the wealthy purloiner,—were it, for example, a curio or article of vertu,—mere affluence would not infer absence of motive. In the case of any other crime, it is the extreme of rashness to conclude that motive is absent, because it is unascertainable, and even defies conjecture. If one but practise a little introspection, the variety and the apparently trifling nature of the motives which sometimes actuate man, even in innocent matters, must strike him. Further, that these secret springs of action should be obscure to others must appear quite natural. In this respect of want of adequate motive, the London tragedies would be hard to bring within the category of so-called *moral mania*. *Intellectual* derangement might account for them, so far as this point is concerned. Absence of reasonable motive and presence of unreasonable motive—the play of hallucinations and delusions—may turn out to be a plausible explanation. But, in so far as motive goes, the theory that these crimes are the results of *monomanie sans délire*, seems untenable. They bear no resemblance to the few instances of this alleged disease recorded and repeated in every medical treatise on the subject. A sudden and “unaccountable” desire to take life: a wife waking in the night with an irresistible impulse to kill the husband at her side, with no reason for it and in spite of strong affection for him; a servant, while undressing a child of whom she had the charge, being struck with the whiteness of its skin, and thereby possessed by an impulse to murder it; and so forth—an inexplicable craving, which is not persistent. But here we have something different. The impulse was, to all appearance, sustained, unless indeed these various murders turn out to be the work of several individuals, and those unconnected with each other, the later cases being the result of a morbid imitation of the earlier. It was not a sudden flash out of a propensity to kill. It was persistent or recurrent. A most common evidence of this so-called insane and irresistible impulse is the voluntary confession of the act. Immediately the impulse is gratified, it seems to pass off; and the murderer quietly surrenders himself to the proper authorities. This is a strong argument in favour of the insane nature of the impulse. It will, we believe, be acknowledged by medical observers to be the fact, that of those alleged homicidal maniacs who fly after committing the murder, all show unmistakeable symptoms of intellectual insanity. On this ground alone, then, we are forced to the conclusion, that the apparent absence of motive in these London murders is not to be

explained on the irresistible criminal impulse theory, and that the case is outside the category of "moral mania."

The craft and cunning evinced in the murders in question seem little to consist with insanity. The rash and uncalculating act of the lunatic is not here. No doubt there are on record a few isolated instances of considerable caution being shown on the part of insane homicides. But we are not acquainted with any which approach to the present in display of prudence and circumspection. The craftiness of the author, or authors, of these deeds is astounding, and the highest tribute to it is the fact that all attempts at detection have been made in vain hitherto. There is, first, cool and deliberate preparation. There is then a careful selection of time and place—darkness and seclusion. There is the choice of a class of victim which, of all others, can most readily and as a matter of ordinary course be decoyed away alone to a secluded place of the kind and at such an hour. The actual execution of his foul purpose must have been swift and dexterous, and shows coolness of hand and steadiness of purpose. Then all traces of the crime must have been removed from the assassin with great skill and foresight. The perfect circumspection which has characterized his subsequent movements, and has secured complete concealment for him hitherto, have been skilful in the extreme, and must have been previously devised. Lastly, the daring shown in the repetition of the atrocities (assuming them for the moment to be the work of one hand) is only to be equalled by the caution shown in refraining from any too foolhardy attempt to repeat them where detection was imminent. These things are all markedly in the direction of disproving insanity. Dr. Ray, in contrasting the sane criminal with the insane, remarks: "The criminal lays plans for the execution of his designs—time, place, and weapons are all suited to his purpose; and when successful, he either flies from the scene of his enormities, or makes every effort to avoid discovery. The homicidal monomaniac, on the contrary, for the most part consults none of the usual conveniences of crime; he falls upon the object of his prey, oftentimes without the most proper means for accomplishing his purpose, and perhaps in the presence of a multitude, as if expressly to court observation, and then voluntarily surrenders himself to the constituted authorities" (*Medical Jurisprudence of Insanity*, p. 157).

It has been pretty generally thought that the fact that the victims were all women of loose character presents a difficulty in the case, and that this, taken along with the particulars of the mutilation, indicates the presence of an erotic element. This is open to doubt. For one thing, erotic and homicidal tendency do not seem to have been found to co-exist. But the inference seems superfluous, too, in order to explain the choice of prostitutes as victims. The true explanation is probably that which we have indicated above, viz. that members of this class were more easily and unsuspectingly lured away to a lonely place.

LORD MONCREIFF AS A JUDGE.

THE time is, one may hope, far distant when the task will devolve upon the journalist of reviewing in its entirety the long and distinguished public career of the first Lord Moncreiff of Tulliebole and Kilduff. But one phase of that career has now been brought to a close. Lord Moncreiff's judicial work is done—as a judge we shall know him no more; and one may therefore, whilst it is fresh in public recollection, without impropriety, as I deem, review that portion of his public work.

As a judge Lord Moncreiff filled two important offices. As Lord Justice-Clerk he had a large share in the administration of the criminal law. As Lord President of the Second Division of the Court of Session, he presided in a tribunal of co-ordinate rank with the First Division, as an Appellate Court subordinate only to the House of Lords. In the case of many judges it would be quite unnecessary to attempt to discriminate between their work as criminal and as civil judges. It is not so, however, with Lord Moncreiff. Any estimate of his position and usefulness as a judge will differ immensely, according as regard be had to his work in the criminal or in the civil Court.

Of the career of Lord Moncreiff as Lord Justice-Clerk in the criminal Courts, one can speak with almost unqualified approbation. Familiar acquaintance with the criminal law, long experience as Lord Advocate in its administration, an intimate knowledge of jury practice, a ready grasp of the salient points of evidence, and a due sense of their proportion; a wide knowledge of human nature, of men, and of affairs; and an abundant command of appropriate expression, were qualities and acquirements which Lord Moncreiff brought with him from the Bar to the criminal Bench, and they combined to make him at once a thoroughly safe and admirably efficient criminal judge. It is hard indeed for a judge, especially for a judge who at the Bar has had large experience as prosecutor in criminal practice, to hold the balance exactly even between the prosecution and the accused. No criminal judge of our day possessed this quality in a higher degree than did Lord Moncreiff. When the Lord Justice-Clerk was on the Bench, the Advocate-Depute had never cause to complain of a squeamish charge, or counsel for the prisoner of a failure to recall clearly to the minds of the jury those considerations which told in the prisoner's favour. One often hears of "dead" charges,—“dead” for acquittal sometimes, much more frequently “dead” for running in. But with Lord Moncreiff on the Bench, when there was anything in a case at all, one never heard a charge “dead” one way or another. No judge more thoroughly understood the province and function of the jury, and whenever there was a question to go to the jury, that told either for the prosecution or for the defence, Lord Moncreiff

took care that it went with assistance, doubtless, but with directions never, except on matters of law, from the Bench. To the jurymen confused by the profusion of details, and perplexed by the conflict of testimony, nothing could be more admirable than the masculine decision with which Lord Moncreiff brushed aside all irrelevant and unimportant particulars, fixed at once upon the really important points in the case, and made the rough places plain by his terse and luminous analysis of the evidence. No man, too, knew better how to take from a witness just those further particulars necessary to make his evidence clear without loading the case with unnecessary details, or yielding, as judges sometimes do even in solemn trials, to the temptation, out of mere curiosity, to make the witness unveil the seamy side of social life.

The question is often asked, Is so and so a severe judge? That question may have been often asked about Lord Moncreiff, but it was never, we think, answered either with an unqualified affirmative or negative. As Lord Moncreiff succeeded admirably in holding the balance between prosecution and defence during the conduct of the trial, so in meting out sentence after conviction he held the mean between severity and leniency. There have been judges who have done this as a general rule, and yet who have on an occasion, through some strange freak or idiosyncrasy, passed sentences of extraordinary severity or of ridiculous leniency. But such was not the case with Lord Moncreiff, who, in dealing with criminals, was as free as any judge of his time from prejudices or cranky notions. So far as our recollection serves, no sentence passed by him was ever commented upon, even by an evening paper, as being "remarkable."

It is with some reluctance that we turn from Lord Moncreiff as Lord Justice-Clerk to Lord Moncreiff as Lord President of the Second Division of the Court of Session. There can be no doubt that the Division of the Court over which Lord Moncreiff presided, has not in recent years enjoyed in a high degree the confidence of the legal profession. There is a tradition in the Parliament House, that ever since the Court was divided into two Divisions, the Second Division has always been second. That may be so, but there can be no doubt that the conduct of business in this Division has never before occasioned such lively dissatisfaction as during the last dozen years. We do not quote here any of the innumerable tales and gibes at the expense of that Division, which float about the mouths of practitioners. It is enough to advert to the fact, "which nobody can deny," that the expressions "Second Division Law" and "Second Division Case" are as familiar and as well understood as the expressions "civil law" or "special case," and that both convey a sense the reverse of complimentary to every practitioner's ears. The complaints against the Division are that little justice is done to the arguments, and that there is no confidence that a case will be disposed of in accordance with

rules and principles which have generally commended themselves to lawyers, or which have hitherto been understood to obtain as the law of Scotland. To formulate the complaints a little more amply and precisely, they are:—

1. That by a system of constant interruption from and conversation upon the Bench, the arguments of counsel are torn to tatters; that it is frequently thereby rendered impossible to state an argument with intelligence or connection, and sometimes counsel who have a strong case are hunted to earth without any opportunity of stating it.

2. That as the judges will not listen with patience to statements which do not at the very outset make clear the nature of the dispute, or to the reading of any considerable portion of the evidence, they form hasty impressions which dominate them throughout the hearing, and prevent their giving attention to arguments or evidence which tend in a contrary direction.

3. That in disregard of authority, such effect has been given to certain prepossessions in regard to the disposal of certain classes of cases, and to certain opinions as to the policy of the law, as to shake public confidence in the consistency and continuity of the law as interpreted by the decisions of the Court.

These are somewhat serious statements, but they are statements which, I venture to think, would be subscribed to by every counsel and agent practising in the Court of Session. Nobody who has any considerable practice, but has had some experience of one or other of these forms of complaint; and the result is that the most intense dissatisfaction is felt by every agent who holds a judgment when his case is “transferred” to the Second Division, and that many even of the most experienced and painstaking counsel dislike exceedingly having to plead before that Division.

Now, such having been the state of matters in the Division over which Lord Moncreiff presided, it is impossible to affirm that his Lordship was a quite successful Divisional President. But whilst one cannot altogether absolve him from responsibility for the state of matters which has prevailed, it would be unjust to hold him wholly or indeed mainly responsible for it. On the comparatively rare occasion on which Lord Moncreiff sat as one of seven or of thirteen judges, there was no one who carried greater weight or who rendered more valuable assistance in arriving at a sound result. This circumstance seems to suggest that under different conditions Lord Moncreiff might have been as eminent and successful as a judge in the civil as in the criminal Courts. That he did not achieve a great success in the Second Division Court-room is to be ascribed to a variety of circumstances, and very largely to his environment there.

When Lord Moncreiff came to the Bench, he was not a learned case lawyer. At no time had he a large Inner House practice; for

many years his parliamentary work had kept him much in London, and when he came down to Edinburgh on professional work, it was generally for jury trials—no great schools of law.

There have been judges who knew little law when they came to the Bench, and who yet became most learned lawyers. It may be presumed that Lord Watson, for example, was not very familiar with English case law when he was raised to the House of Lords, and yet he is now, it is said, credited with being the best read equity lawyer in that august tribunal. But a learned lawyer Lord Moncreiff never became. He lacked that capacity for drudgery, and that quiescence of temperament, which such a course of study requires. To be a good judge, however, it is by no means necessary that a man should be an accurate and learned lawyer. Familiar acquaintance with the law is always an advantage; but give him the necessary assistance, and a man of quick apprehension and sound judgment will often return a more satisfactory opinion than far more learned lawyers. As a practising solicitor, I can affirm that there are men at the Bar who carry about very little law indeed with them, but whose judgment, nevertheless, upon a point of law, I should prefer to that of any pundit, provided always that I was satisfied that that judgment had been formed after the case and the authorities had been explained by a careful junior or an intelligent solicitor. So, too, there are judges who, with little legal learning, are nevertheless able, with the assistance of an able Bar, soundly to administer the law.

It cannot be claimed, however, for Lord Moncreiff, that he atoned for his lack of an accurate knowledge of the law by great care and patience in his application to the authorities cited and commented upon from the Bar. He had all the natural quickness which ought to have enabled him to master every point of a case, and readily to appreciate the bearing of the questions of law which might be raised. But he failed partly because, himself impulsive, it was his misfortune to sit in that atmosphere of impulse and interruption to which reference has already been made, and partly on account of the natural impatience of his own temperament. It was this impatience which led him to be one of the most unfortunate and provoking of interrupters. Instead of listening with patience to the arguments of counsel, the moment the pleader lost his ear, either by becoming a trifle tedious or because he was on a somewhat dry subject, or because his drift was not for the moment clear, or the judge did not quite follow him, that moment Lord Moncreiff forgot all about the Bar before him, and began burrowing away for himself amongst the papers for a minute or two, when, having lighted upon something which, as appeared to him, might have some bearing upon the case, he interrupted with some question a hundred miles away from the point on which the counsel was speaking at the moment. Lord Moncreiff's interruptions were the most provoking of all. It is

bad enough to have to carry on an argument under a running fire, impossible to do so amidst a series of explosions. These interruptions, too, were not the less trying that they were always serious and conscientious, and were never made with a view to quiz, or worry, or silence the pleader, or to amuse the listeners.

It is of great importance for the orderly conduct of the business of a Court, that its President should be thoroughly master of all the forms of process and rules of procedure. Of such forms and rules Lord Moncreiff remained to the last profoundly ignorant, and what regard was paid to them in his Court-room was due entirely to the clerks. Perhaps it was that same distaste for little technicalities, and contempt for small details, which enabled Lord Moncreiff, as we have seen, to brush aside what was unimportant, and grasp the broad facts in a criminal trial, that disqualified him from being a successful Divisional President in the civil Court. That condescension which does not despise minute detail and technical rule may no doubt be combined with intellectual grasp and breadth of view, but the two elements were not united in Lord Moncreiff. Nothing could have been more striking, for example, than the contrast between the way in which "Single Bills" were disposed of in the First and in the Second Divisions respectively. In the First, the most extraordinary care—no case not summary ever slipped by any chance into the Summar Roll, no petition ever passed without all the intimation and service that the law requires, no account of expenses was ever approved unless counsel were there to move it, and no omission on the print, such as that of the printer's name or the clerk's letter, ever escaped the watchful eye of the Bench. What an extraordinary contrast between all this, and the—"Suppose it's all right," "Give you anything you ask," "Adjust the matter with the clerk," "Early hearing? yes, take it to-morrow, if you're ready"—way in which such business was transacted on the other side of the corridor.

Indications were not wanting in later years that Lord Moncreiff realized that the conduct of business in his Division of the Court did not give satisfaction to the profession. More than once he seemed to have made up his mind to attempt to remedy the evil, but it was too late, and he had perhaps better have let matters alone. His own manner and habit of thought had become too stereotyped, his relations to his environment too well-determined, for any change to the better to be looked for in his day.

I have spoken with frankness of the judicial career of Lord Moncreiff, and have pointed out that, whilst as a Divisional President he was not successful, as a criminal judge he ranks in the foremost place amongst the lawyers of his generation. Upon his political and educational work, his wide culture, his finished eloquence, exemplified as it was by perhaps the richest voice that ever resounded in the Parliament Hall, his unblemished character, lofty aims, and genial presence, this is not the time or the place to

enlarge. If in one sphere of his public service his work was not crowned with success, he yet leaves a great name behind him in Scottish jurisprudence; and I feel sure that he carries with him to his retirement the hearty good wishes of every member of that profession which was proud to number him amongst its members.

S.S.C.

CONTEMPT OF COURT—AN EXTRAORDINARY CASE.

AN extraordinary scene was witnessed upon 27th July last in the General Court of the Bahama Islands. A prisoner, Thomas Taylor, had been sentenced by Chief-Justice Austin, but for what offence does not appear from the reports to hand, when, suddenly breaking loose from his keepers, he sprang on to the bench, with a roar like a fog horn, seized a ruler, and went for the Chief-Justice. Before the astonished judge could comprehend the situation, he had received several severe blows upon the head and body, and the judicial blood flowed freely upon the bench. Recovering, however, from the first confusion, the Chief-Justice grappled desperately with his assailant, roaring "murder" the meanwhile in stentorian tones, which reverberated in the furthest recesses of his jurisdiction. Had he been left to deal with his assailant alone, it would probably have gone hard with the judge, notwithstanding his desperate struggles; but, realizing the situation on recovery from a momentary panic, the officials of the Court, the clerk, prosecutor, and officers, rushed to the rescue of their chief. Overcome by numbers, Taylor was beaten off the Chief-Justice, and a moment afterwards he was pulled down. Then, tied neck and crop, he was carried to the cells, yelling like a chained gorilla under a branding iron.

Four days later, Taylor was brought up before the same Court, to receive sentence for his contempt of Court. The Chief-Justice presided, and there and then, without trial or inquiry, summarily pronounced the following sentence upon the prisoner, for the contempt of which he had been guilty:—

"*In re Reg. v. Thomas Taylor*, for contempt of Court.

"The writ of habeas corpus addressed to the keeper of the Nassau prison, commanding him to produce before this Court, or the Chief-Justice or judge of this Court, the body of Thomas Taylor, a prisoner in said Nassau prison, and in obedience to said writ the said keeper of said prison having produced the body of the said Thomas Taylor:

"And the said Thomas Taylor standing now before me in the Court:

"The Court, by the mouth of the said Chief-Justice, makes and pronounces the following judgment and order:—

“That you, the said Thomas Taylor, being then a prisoner under sentence in and before the said Court on the twenty-seventh day of July instant, presiding in said Court the said Chief-Justice of the said General Court of the Bahama Islands (to wit Her Majesty the Queen’s Superior Court of Justice in and for our said Bahama Islands), while sitting on the bench holding said Court, in open Court did make a murderous assault by attacking the said Chief-Justice on the bench, and did beat and strike the said Chief-Justice on his body with a weapon, drawing blood, and did then and there strike other blows aimed at the head and body of the said Chief-Justice, the same being, and each of said acts and blows and strikings upon the said Chief-Justice, or aimed at him, being contempts and a contempt of Court, to wit of the said General Court of the Bahama Islands, and against Her Majesty the Queen’s General Court of the said Bahama Islands, Her Majesty’s Superior Court of Justice in our said Bahama Islands :

“It is hereby ordered and adjudged that, for said contempts, the said Thomas Taylor be whipped, and do receive on his back, within the precincts of the prison walls of said Nassau prison, in the city of Nassau, on the thirty-first day of July instant, between the hours of four and five o’clock in the afternoon, thirty lashes :

“And it is hereby further ordered and adjudged that the said Thomas Taylor be held and kept in penal servitude hereafter for and during the term of his natural life.”

The foregoing sentence was doubtless one of extraordinary severity ; but we do not pronounce it too severe. We have not such information of the circumstances as would warrant us in pronouncing any judgment upon it. If the intention of the prisoner was to murder the judge upon the bench, no sentence short of death could have been too severe ; and, apart from this, an exemplary sentence might be justified by the prevalence in the islands of a spirit of contempt of authority and ferocious resistance of the law. But whatever may be thought of the severity of the sentence, there can, we think, be but one opinion as to the impropriety of the manner in which the case was dealt with by the Chief-Justice.

It is monstrous that a man should be sentenced to penal servitude for life summarily without trial, and it is contrary to every sense of decency and propriety that a sentence of penal servitude should be passed by a judge who is himself the injured party. We have no sympathy with the protest which is sometimes taken, and which has met with some sympathy in recent judgments in the High Court, against the possession and the exercise by the judge of a power to inflict a summary sentence for that gross disrespect for the dignity of judicial authority which amounts to a contempt of Court. Such a power is necessary in order to maintain the authority and dignity of the Court, and order and decorum in the conduct of its proceedings. If a man persists in

interrupting proceedings, as in expressing approval or dissatisfaction, the Court has the power to repress him, and it is necessary sometimes that this power should be exercised. In such a case it would be absurd to dispose of the matter otherwise than summarily, and three days in jail is quite an appropriate corrective. But it is otherwise when the offence is of so heinous a character as to infer a heavy punishment. In such a case there is no reason why the prisoner should not be tried in the ordinary way, and every reason why the utmost discretion should be exercised in the conduct of the prosecution. The matter has become a question not merely between the criminal and the law, but also between the criminal and the officers and administrators of the law; and as the prosecution and the trial must necessarily be conducted by members of the latter class, it is most desirable that the proceedings should be void of every appearance of partiality.

Such could not be the character of proceedings when, as here, in passing sentence, the judge was avenging personal assault and indignity offered to himself. But one excuse for the conduct of Chief-Justice Austin suggests itself, he may have been satisfied that Taylor was quite determined, sooner or later, to do for him, and he may therefore have resolved to take effectual steps to frustrate that intention, by locking Taylor up for life.

THE TURFBURGH TRAGEDY.

Gaboriau Out-Gaboriau'd.

II.

Now, if this story were in regulation form, in the form in which it certainly would be served up in France, it ought to tell at this stage of how the policeman put seals on all the room doors in the hotel before leaving the building with his prisoner. This functionary ought also to have stationed *gens d'armes* at all the places of exit, and at any other spots which the culprit was genuinely unlikely to pass, with strict orders not to allow any person to go anywhere. Moreover, a detective ought straightway to have been telegraphed for—a famous detective from Paris; a man of genial soul and gentle manners, wedded to a pretty wife, and possessed by quite a touching passion for amateur gardening. That would be essential. Yet, sad is it to state, we are unable to provide it. Besides these requisites, too, it would only be in order that the mayor should be present at the outset of the investigations; and he ought clearly, if it can possibly be managed, to be a mayor with a beautiful daughter, who is enamoured of either the victim or the suspected assassin. Further, there ought also to have arrived early on the scene an outwardly austere “investigating

magistrate." His function would be, of course, to writhe under a secret passion for the niece, sister, daughter, mother, or paternal aunt of one of the parties to the murder; and his make-up would be, equally as a matter of course, to quote Horace, *a propos* of conversation and incident introduced for that purpose alone. Now, that such embellishments are fitting and to be sought after is obvious, and all will be sensible of the blank resulting from the want of them. But it is best to own candidly and at once that not one of these articles can be supplied in this story. A regard for the probabilities, appropriate to the locality where the facts occurred, forbids our attempting it. Our criminal system does not show up well in a story. Its preliminary procedure is not sensational—is miserably destitute of the merely picturesque. Far too direct and business-like is its method now-a-days. The policeman at Turfburgh did not put seals on any doors. He put the keys in the outside of the locks, and turned them after he came out; and he remarked casually to the lady manager that perhaps it would be as well if she did not put any new visitors into the rooms for a little, or alter their arrangement in any way just yet. His tone did not convey the idea that it would matter very much if she did. Then he went away with his horror-stricken little prisoner, to report to his superiors, and to return reinforced. In course of time the chief constable would report to the procurator-fiscal, and he in turn would investigate the matter thoroughly, and then lay the results of his investigations before the counsel for the Crown. With the latter would rest the responsibility of deciding whether or not further proceedings should be taken. As for the mayor, Turfburgh not being French or English or Irish, but only Scottish, did not, of course, possess a mayor. It had a mere provost. And, even if the provost had been told of the occurrence, he would only have set about procuring the order for the baronet's coffin,—for the worthy man was an undertaker to trade, and usually kept sober enough to attend to business up till about three o'clock in the afternoon (by which hour all well-ordered interments ought to be over),—and he would not have dared to join the informal gathering just described. Then about romance,—the provost had four daughters, it is true. But daughters and romance are not necessarily connected with each other in this country, as they appear to be in France. Two of these young ladies assisted their maternal uncle to keep a public-house (Roger's New Restaurant, before alluded to), and were much more addicted to redoubtable chaff than to delicate sentiment; a third was married to the local grocer; and the remaining beauty—she who had presented the passing Premier's wife with a twenty-two-and-sixpenny bouquet from Glasgow—was engaged to be married to a commercial traveller from Birmingham—a man who wore a tall hat even on week-days. So there can be no romance so far as the provost's family are concerned. And as

for the investigating magistrate—there, too, it is out of the question. The procurator-fiscal of the county, who most nearly answers to the description, was a plain, matter-of-fact old lawyer. He probably did not know Horace even by name, and certainly had no bowing acquaintance with him, as investigating magistrates seem to have in France. Having been married twice, he had no hankering after a third union with anybody's daughter, or sister, or niece. So we must resign ourselves to getting along without these embellishments as best we can.

The hotel servants were gathered in a little knot. "We'll all be witnesses," said the waiter. There were both solemnity and the feeling of importance in his tone; but far within his soul was exultation. "I can swear to the bar'net's takin' his own candlestick to his own room last night. I lighted it for him, and I seen him go. And I observed very particular the pris'ner"—(how adaptable is the human race!)"—"I observed the pris'ner lookin' at his lordship's (*sic*) rings most avaricious when I was 'takin' away.'"

"Will he be tried here?" asked Boots.

"Cert'inly," said the well-informed waiter. "What would the 'Lords' come here for if it wasn't to try our own murders when we have them?"

"And will he be hanged here?" inquired the chambermaid, anticipating judge and jury.

But the waiter could not tell her the practice as to that, and for once he had the honesty to confess his ignorance. Boots ventured to remonstrate against the indecent haste of the verdict implied in the question. They, however, were a united three against a doubting one, and he was speedily talked down and silenced. But his doubts remained. It was an unsettled day with them all. Work was fitful, and the ordinary rules as to industry seemed to be in abeyance. During the morning people came about the hotel—the Paul Prys of the town, and many who had the pretext of real business to bring them. With these the other inmates, vastly important and loquacious, and yet mysterious withal, had many a talk, each successive narrative growing more graphic, more connected, and more circumstantial, until from frequent repetition conjecture and fact became undistinguishable even to the narrator himself. Boots, however, kept his counsel. Marvelously well for one of his education and mental discipline, he parried too searching questions. True, he could not avoid giving an account of the affair more than once; for his duties included meeting the various trains on their arrival at Turfburgh, and amongst the railway officials and the station loungers, Boots had many friends. These, you may be sure, were not inclined on this, of all occasions, to allow his acquaintance to drop. But he was guarded in his statements. In the main he stuck to hard facts, and when he left that solid region, he saved committing himself

by a parenthetical "They say," or, "David, he thinks," or the like.

Yet Boots was more in earnest on the subject than the most voluble of them all. He examined the *locus* with care. Most minutely he inspected every article in the several rooms in search of a trace of the perpetrator of the deed. That the piano-tuner was the culprit, he could not bring himself to believe. So he pondered, and pondered, and took careful note of all he saw. At length an idea flashed across his mind. In his examination of the murdered man's room for the fourth time, he noticed something which gave him a clue.

Boots took the chief constable aside when the police returned, and he pointed out to that unimaginative worthy a mark which completely changed the line of his investigations, and led to a discovery of the truth at last. And thus the piano-tuner's neck was saved by a brusher of boots and carrier of luggage, and not by the subtle intellect of a famous detective. There was no detective on the spot to ascertain by sheer acuteness that the open door of "No. 12"—the little man's—had been left in that position by some one who had *come out*, and not by some one who had *gone in*; and that consequently the lawful occupant was not himself the last person who had entered it; or, secondly, to gather from the situation of "No. 12's" shoes on the door-mat that they had been accidentally kicked by a *tall* man, and not by a *short* one. Such discoveries would have been mere child's play to a Parisian detective. But no such discoveries were made in Turfburgh. Before the policeman even saw its position, the door of No. 12 had been opened and shut several times, and before the real investigation began the shoes were in gaol, on the feet of their miserable little owner. Then, too, it was Boots, not a famous detective, who whispered the doubt which led to certainty. Will it be believed? The policeman who was first summoned by the horror-stricken servants had never heard of Mr. Judson's having remained over night in the hotel, and having left early that morning—two good hours before Boots discovered that the visitor whom he could not awake was dead! The constable had never even asked what visitors there were or had been in the hotel—he was not a bright, but only a sober man. And it had never occurred to the various hotel officials to mention Mr. Judson's visit. It all seemed so natural: his early rising, early breakfasting, and early departure, being carried out precisely as arranged the preceding evening, before the deceased came to the hotel, before they knew that he was coming. Judson, moreover, had not even seen the baronet. He had gone to bed long before the arrival of the midnight train, and could not know of the fact of his being in the hotel. But it struck Boots as strange; and, when told by him to the chief constable, it struck that officer as suspicious. Something else was told him by Boots, and thereafter his investigations took the

definite direction of an endeavour to trace the missing Judson, and to find pointed evidence of the piano-tuner's innocence, of which he no longer entertained any doubt.

The investigations took their regular course. In a very short time the wisecracks of Turfburgh were scandalized by the release of the "murderer," as they had speedily learned to call the poor little piano-tuner. The authorities were busily at work; and Mr. F. C. Judson arrived in due time to take the small man's place in Turfburgh gaol. He was tried before the next Circuit Court.

The court-room was crowded. The provost was present (officially, and without fetching his daughter, to swoon as they do in France); and, there being no funerals that day, he was able to remain, with brief intervals for refreshment, until the verdict was announced, and the sentence given—under gaslight, at the end of a long, hot summer day. Until this day no one (except the readers and the writer of this admirable story) knows how the candlestick belonging to bedroom No. 11 came to be in the bedroom of the piano-tuner on the morning of the murder. No one has less of a theory on the subject than the said little man who awoke with two candlesticks. Nor can it be explained how the tuning-fork and the letter aforesaid happened, *e contra*, to be found in No. 11, as a sort of somnambulistic set-off. If the good folk of Turfburgh could have obtained the services of a French detective, these things would all have been made abundantly plain to them. Short of second sight, there is no other means of discovering them. At the trial the counsel for the Crown could only suggest (what we know *not* to be the true explanation) that the actual criminal had effected this transposition of belongings for the purpose of incriminating the innocent little occupant of No. 12. But hypothesis is all that the British public can look to have in such cases, until a treaty is concluded with France by which Parisian detectives shall be declared as freely international as smallpox. The other facts of the case, however, came out clearly. The doctor read a learned report with much gusto and grace. His townsfolk there present felt proud of their doctor, and looked this feeling at the forensic strangers. How they wished that the prisoner's counsel would only attempt to cross-examine that formidable practitioner! He would then discover what playing with edged tools meant. The waiter told his story, though not a tenth part so bravely and confidently as he had done many a time before at rehearsal among his familiars. But he told it well, and at the haziest and most critical parts he "came up to his precognition." Many witnesses followed. It was established beyond doubt that Mr. F. C. Judson *was* from London. The waiter had been correct in his surmise. He was a stylish burglar, one of a gang,—by no means obscure in his antecedents,—a famous man, well known to the police. Many a time his portrait had graced the pages of that select and

privately circulated periodical *Hue and Cry*. His movements had been traced to a town in the north of England on the morning before the murder. From the telegraph department of the Post Office of that town, the police discovered that a telegram had come to the prisoner there in the afternoon of that day, despatched from a town near Turfburgh, at which the annual horse races were being held. It was in cipher; but the most ingenious cipher will yield to skill and patience. This one was not very cleverly devised, and, being translated by experts, the message ran:—"Sir —, —, Large wins. To-night: Turfburgh, Station Hotel." Immediately after receiving this intelligence, Judson had hurriedly left his hotel, and had taken the north train. At the English station, however, he had not booked through to Turfburgh, but had taken a ticket for B—— only, a town about half-way between the two places. So testified the hotel porter at the English town, to whom he had ostentatiously displayed his ticket, and whom he had ordered to label his luggage for B——. At B—— he had taken a ticket for Turfburgh. The lady manager now recalled that when he arrived at the Station Hotel the prisoner had asked, when entering his name in the visitors' book, if she expected any more visitors that night. The question, of course, had not struck her as of any consequence at the time, but she could distinctly remember it now. On the morning following the crime, Judson had taken a ticket for Glasgow, and had got into a Glasgow carriage, taking all his luggage into the carriage with him. But it was proved that he had not gone so far. At a junction some score of miles distant he had got out, waited there a short time, and, catching the express as it passed, had returned to London. Lastly, there was unimpeachable evidence that Judson had had in his possession the murdered man's watch and jewellery; and that the cheque which had been handed to the deceased in payment of his winnings at the race meeting, had been cashed in London two days after the crime—cashed by some one other than the baronet, and with a forgery of his signature on the back.

No one in the hotel had heard any noise during the night when the crime was perpetrated. Apparently the murdered man was the only inmate of the house troubled with insomnia. Boots was an important witness for the prosecution. Throughout it was a gloomy case for the prisoner's counsel; but that gentleman's face perhaps looked its gloomiest when Boots was in the box. He had cleaned the boots of the gentlemen the night before. He cleaned No. 9's (Jujube's) first, and then No. 13's (the prisoner's). He put both of these pairs at their respective doors. He cleaned them early, because they went to bed early. (Boots, be it observed, did not distinguish in his language between boots and boot-wearers.) He cleaned both pairs before he went to meet the midnight train, and he replaced them at the doors before he went out. With a piece of white chalk he had put on the sole of each

boot the number of the room from which he had taken it. He did not clean No. 11's (the deceased's), or No. 12's (the small man's), until after these two gentlemen had gone to bed. As he passed along the corridor while the deceased and the small man were still in the coffee-room, he noticed that the boots which he had left at the door of No. 13 were no longer there. He supposed that the gentleman had taken them in. In the morning, when he called the prisoner, and went in to fill his bath, his boots were in his room. When the prisoner went away, he had on the boots. As a matter of fact, the prisoner before committing the crime—which he intended to be only a robbery and not a murder, but “unfortunately” his victim awoke—had put on his boots in order to be ready for flight or any emergency. On the carpet of the murdered man's room, Boots proceeded, he noticed two faint chalk marks. One he could make out to be the reverse impression of the figure 3, and the other was the very faint impression of the figure 1. These marks were just such as might have been made by a pair of boots with these numbers chalked on the soles. He had called the attention of the constable to his discovery; and the local architect had sketched the marks and their position on the floor in a very pretty plan, now produced.

“And so,” as Boots said that night to his friends at supper,—(all in mufti still, for they had returned late),—“and so, if he had been born a one-legged man, with a wooden leg and only one boot, perhaps we never could have got him hanged. For, don't you see, in that case the sole of the only boot might ha' been the one which left the mark of the figure 1 and not of 3; and then it might ha' been 12 as likely's 13 that done the murder. But puttin' this and that together, the 1 and the 3, you see we managed to make out 13 or 31. There isn't no 31 in this hotel.”

Correspondence.

THE RIGHTS AND WRONGS OF THE NOTARY PUBLIC.

(To the Editor of the Journal of Jurisprudence.)

SIR,—Within the last ten or fifteen years, one of the best abused branches of any profession has been that of the Notary Public in the profession of law. Judging from the amount of prejudiced opinion, venomous language, and distorted facts with which he has been assailed, an uninitiated outsider, ignorant of the various grades or divisions that are still to be found in the legal profession, and who has been in the general and somewhat popular habit of thinking that, taken all over, one lawyer is just as good and as

bad as another, would be inclined to jump to the conclusion that the Scottish Notary Public was a person who knew nothing whatever of law, who held a most degraded position in that profession, and who was on no account to be trusted. A very little amount of inquiry would, however, enable such a person to satisfy himself, not only of the satisfactory legal culture and ability of the general body of Notaries Public in Scotland, but also of their undoubted honour, integrity, and respectability. A little further inquiry would also satisfy him that the opinions and language referred to had flown from a very prejudiced source, and that any claim they had to serious consideration was on that account very much weakened, and in any event was more apparent than real. Indeed, of a great deal that has been said against the notarial branch of the profession, it may safely be averred that nearly every word is an exaggeration, and that the statements made create, and rightly create, a strong feeling of improbability.

The source from which the attacks in question have come is from certain members of that branch of the legal profession occupied by the "Law Agents," a body of men who were brought into existence in their present form by the Law Agents Act of 1873. The first section of that Act declares that "Law Agent shall include Writers to the Signet, Solicitors in the Supreme Courts, Procurators in any Sheriff Court, and every person entitled to practise in a Court of law in Scotland." The Act was passed in accordance with the recommendation contained in the Report of 1870 by the Royal Commission appointed to inquire into and report upon the Courts of law in Scotland, that all privileges and monopoly of practice in the inferior Courts, enjoyed by the incorporated societies of legal practitioners in Aberdeen, Glasgow, Edinburgh, and Paisley, should be abolished, and that the legal practitioners in Scotland should be placed on one general footing. The recommendation, however, was not fully carried out, and experience has proved that the failure to do so was a mistake. The real objects of the Law Agents Act of 1873 may indeed be said to have been the destruction of monopolies, and the building up of the solicitor branch of the profession upon one general basis, into which nearly all the various bodies of legal practitioners were gathered hotch-potch and consolidated, regardless of privileges, status, and qualifications. The practical effect of the Act was to throw open the right to practise, not only in the inferior Courts but also in the Court of Session, to agents whose sphere of Court practice had, before the passing of the Act, been limited; and it may be said to have, in this respect, placed on the same level the Society of Writers to the Signet, the Society of Solicitors in the Supreme Courts, the Society of Advocates in Aberdeen, the Faculty of Procurators in Glasgow, the Society of Solicitors-at-Law who practised in the inferior Courts in Edinburgh, the Society of Writers in Paisley, and the various other

societies of Procurators, Solicitors, and Writers throughout Scotland, who had before occupied different positions, exercised various monopolies, and had the regulation and power of admission of new members into their ranks entirely in their own hands. Since the passing of the Act there have been two gates through which a man can gain admission to the ranks of the "Law Agents," viz. through the Board of Examiners appointed under the Act of 1873, and through the Society of Writers to the Signet, which retained its right to regulate the admission of its own members.

But, sweeping as was the effect of the Law Agents Act of 1873, it still left intact two great bodies of legal practitioners in Scotland, viz. the Faculty of Advocates, and the Notaries Public. With regard to the latter, however, the 24th section of the Act provided the means by which a Notary Public who had, during the seven years immediately preceding 5th August 1873, regularly taken out a stamped certificate, as required by law, and who had, during that period, been engaged in actual practice as a Law Agent and Conveyancer, could be admitted a Law Agent. Large numbers of Notaries were admitted Law Agents under this section of the Act. Thus the Society of Writers in Glasgow, instituted in 1865, was, at the passing of the Act, composed of sixty-six members, all duly licensed legal practitioners; and though many were not practitioners in any Court, most of them were admitted Law Agents under section 25 of the Act (Begg on Law Agents, 1st ed. 404). The leading object of that society was to give united expression to the opinions of its members on legal and professional questions, and it exercised considerable influence in that respect. The Act, by its 18th section, also provided for the admission of any enrolled Law Agent a Notary Public, as a matter of course, without examination, and without being required to find caution on his admission.

The principal ground of objection on the part of certain grumbling "Law Agents," many of whom commenced their professional careers as Notaries, to the existence of the notarial branch of the profession is, when analyzed, found to be that of pure self-interest. Legal training, and all that such individuals may say on that subject, may at once be discarded, for the real objection is, and has always been, simple selfishness thinly but ineffectually clothed in the garb of pretended interest for the public welfare and safety. When the plea of public interest was pressed upon the Court in a recent case, at the instance of a "Law Agent" against a Notary, the late Lord Craighill showed the value that the Court were disposed to attach to it when he remarked, "The Law Agent is not acting in the public interest as has been suggested. He is acting for his own interest, and is protecting himself" (*Milne v. Leslie*, 15 R. 468). It must be said, however, that these attacks upon the Notaries have not received the general or very cordial support of the "Law Agent" branch of

the legal profession, and that they are in no way recognised or adopted by the Societies of Writers to the Signet and Solicitors in the Supreme Courts. It should also be remembered that they principally flow from certain meddling busybodies who are continually ventilating their opinions upon legal subjects which they think, require, with their aid or at their instance, mending or ending. They have, indeed, simply drugged the Notary question to suit, according to their ideas, the sick appetite of the time. But though this is the case, it should always be borne in mind that the notarial branch of the profession is just as anxious as any other branch for beneficial or warrantable changes. The Notaries, however, very naturally insist that in the consideration and maturing of such schemes, their interests and their rights should not be ignored or damaged. The arguments and actions of the busybodies referred to have not only been directed against the Notaries, but also against the Faculty of Advocates and the Society of Writers to the Signet. All come in for a full share of exaggerated invective. Their fancy carries them to most extreme conclusions, and, as is usual in such cases, they are not over particular as to the soundness of the arguments they use, or of the reality and strict correctness of the facts upon which they base their contentions. Indeed, any argument or so-called fact is eagerly seized upon by them, should they think or feel it will further the objects they have in view. Fortunately, however, threatened men are extremely tenacious of life, and in this respect the Notaries have remarkably little to fear. They are not afraid to be judged upon a correct and fair representation of all the facts and circumstances; but they do most certainly and righteously object to allow their accusers to occupy the double-barrelled position towards them of both judge and jury.

As an inquiry into the ancient and honourable office of Notary Public is of more historical interest than practical importance, it is unnecessary to enter into that matter here. The Notary's present position is what has to be discussed.

Of the confidence attached to notarial acts, it has been said, "One Notary Public is sufficient for the exemplification of any act; no matter requiring more than one Notary to attest it" (Burns' Eccl. Law, iii. p. 3). According to the Canon Law, one Notary is equal to the testimony of two witnesses: "As to the credit of a Notary, the rule is, *Unus Notarius æquipollet duobus testibus*" (Gibson's Codex Juris. Eccl. Anglicani, p. 996). Massinger, the dramatist, in the Fifth Act of his *New Way to Pay Old Debts*, makes the principal character, Sir Giles Overreach, say:—

... "Besides, I know thou art
A Publick Notary, and such stand in law
For a dozen witnesses; the deed being drawn, too,
By thee, my carefull Marrall, and delivered
When thou wert present, will make good my title."

Now, "Notarial instruments, when *actus legitimi*, are good evidence

of the act which it is the province of a Notary to perform, but not of extraneous facts recited in the instrument" (Bell's Prin. § 2221).

A candidate for the office of Notary must be a person of untainted fame and reputation, of entire honesty, and free from anything that infers infamy or any suspicion of it. He must also possess not a mere smattering of the law, but a knowledge of it equal to that required of candidates for the office of Law Agent.

When a man desires to be admitted a Notary, the present form is for him to apply to the Clerk to the Admission of Notaries, who holds his office under the Crown, and by whom a petition is presented for him to the Court of Session, which bears "that the petitioner, having spent some part of his time in studying the laws, forms, and practice of this kingdom, and being now induced to use and exercise the office of a Notary Public, craves, therefore, to be examined, and, being found qualified, to be admitted; and that the Lords may grant warrant to the Clerk to the Admission of Notaries to mark his protocol book," etc. An attestation by an advocate and by a Writer to the Signet, setting forth their knowledge of the petitioner, and of his good fame and qualifications to practise the law, must be subjoined to the petition; and on its being presented and moved, the applicant is remitted for examination, and if the examiner's report is favourable, he is admitted by the Court to the office of Notary Public.

In the beginning of the present century the Society of Writers to the Signet, with the sanction of the Court, nominated twelve of their own body to be "Examinators of Notaries;" and, before admission, the petitioner had to undergo a very strict and particular legal examination, in presence of at least two of these gentlemen. These "Examinators of Notaries," however, no longer exist, as, on 15th November 1886, the Society of Writers to the Signet resolved that "in future there shall be no separate examiners of Notaries appointed by the Society, but all applicants for admission to the office of Notary Public shall be examined by the examiners appointed by the Commissioners for the Examination of Applicants for Admission to the Society." And in order fully to express what was intended, and the view which has been acted on since that date, they further resolved, on 11th July 1887, as an addition to the resolution above quoted, as follows: "And the examination shall be conducted in the same manner, and embrace the same subjects, as in the case of candidates for admission as members of the Society, excepting forms of process and Court procedure."

The subjects of the final examination of candidates for admission to the Society of Writers to the Signet are—Heritable rights, moveable rights, conveyancing, contracts, successions, actions and forms of process, diligence, and criminal law and procedure. The Notary has now, as formerly, to be examined in all these subjects,

excepting forms of process and Court procedure; and the text-books he is required to study for the examination are—Erskine's Principles, Bell's Principles, Erskine's Institutes, Bell's Lectures on Conveyancing, Ross's Lectures on Conveyancing, Juridical Styles, and Alison's Principles.

On the other hand, it may here be noticed that the subjects in which the "Law Agent" has to be examined before admission are—the Law of Scotland—Civil and Criminal, Erskine's Institutes, Bell's Principles, Hume's Commentaries, Conveyancing, and Forms of Process—Civil and Criminal. It will thus be seen that the only difference between the examinations undergone by the Notary and the "Law Agent" respectively lies in this: that the "Law Agent" is examined as to his knowledge of Court procedure, while the Notary is not. This difference, it is thought, does not afford sufficient reason for the action of certain "Law Agents," who have lent themselves to the practice of writing down the Notaries as "bastards," "poachers," "creepers," and "interlopers,"—not to mention an accompanying and very plentiful sprinkling of vituperative adjectives, which neither add force to the facts, or supposed facts, cited, nor grace to the writers' style of language. The true state of matters is, that both the Notary Public and the "Law Agent" pass strict and searching examinations, and, exclusive of the "Law Agent's" questionable claim to a monopoly of Court practice, both have equal rights and privileges, and stand, to all intents and purposes, on the same ground.

The commission issued to the Notary Public upon his admission is in the following terms:—

"At Edinburgh, the day of 18 , and in Her Majesty's reign the year :

"Which day, Peter Peebles, Writer, Edinburgh, having been duly and lawfully constituted Notary, and presented to the Lords of Council and Session, is after examination found qualified, and thereupon admitted by their Lordships a Notary Public, with Her Majesty's authority, to use and exercise the said office as fully and freely as any other does or may do within Scotland; and hath given his declaration *de fidei administratione*, and received a protocol book, containing the number of ninety-one leaves, all duly marked by me, Clerk hereto subscribing; and is to use the like sign and subscription manual as has been written by him in the Register of Notaries kept by me.

"Extracted upon paper (first duly stamped) from said Register by me, Clerk thereto, this day of 18 .

"Clerk to the Admission of Notaries.

"Copy sign and subscription manual,

"*Sic Vita*,

"Peter Peebles."

This commission is impressed with a £20 stamp; and the total fees payable by the Notary before admission, including the stamp duty, amount to £41, 17s.

A Notary Public has been defined as a public officer who, upon examination and trial, being admitted by the Lords of Session, gets power to take instruments in any honest and lawful business, which instruments make faith in law (Bell's Law Dict., *roce* Notary). His general official functions and powers have been defined as follows:—The general functions of a Notary consist in receiving all acts or contracts which must, or are wished to, be clothed with an authentic form; in giving to such documents a measure of authenticity; in establishing their date; in preserving originals or minutes of acts which, when prepared in the style and with the seal of the Notary, acquire the character of original acts; and in giving authentic copies of the same. The functions and powers of Notaries are very extensive, and there is scarcely a contract or document which may not require at times a notarial attestation (Brooke's Office of a Notary, p. 17).

A "Law Agent," on the other hand, is declared by statute to be "any person entitled to practise as an agent in a Court of law in Scotland" (Law Agents Act, 1873, § 1).

It is, however, proverbially dangerous to give rigid definitions of legal terms; and even where a definition is free from objection, it is generally found to be of little practical value. In truth, in the present case, not one, but a series of definitions would be required, in order to embrace completely the whole functions, powers, and rights of the Notary Public, or of the "Law Agent," for that matter.

The Notary Public is not confined in his practice to purely notarial work; just as the "Law Agent" is not confined to Court work, pure and simple. The Notary's province of practice, which he is legally entitled to exercise, goes far beyond that; and probably to this right may be traced the ill-natured objections to his existence that emanate from certain "Law Agents."

In the Report to the second annual general meeting of the Society of Procurators of Midlothian, it was stated, *inter alia*, that the Society "had induced the Commissioners of Inland Revenue to issue two separate licences—one applicable to Law Agents, the other to Notaries Public, whereby Notaries were restricted to purely notarial work." In this act we have a very fair reflection of the littleness, bigotry, and petty feeling that characterize the movement against the Notaries. The part of the Report quoted is incorrect. True, two forms of licences are now issued, but it is not the case that the licence issued to the Notary has the effect of limiting his rights and privileges to "*purely notarial work*." It would be *ultra vires* of, and indeed useless for, the Commissioners of Inland Revenue to attempt to issue a licence calculated to create such a restriction;

and they have not done so. They might just as well, and with much more reason, issue licences to "Law Agents" that would have the effect of confining them to their proper sphere, viz. *that of practising as Agents in the Courts of law in Scotland as indicated in the 1st section of the Law Agents Act of 1873*. Though two forms of licences are issued, the Notaries' powers and privileges remain unaffected. No doubt certain "Law Agents" have become possessed of the idea that they and they only should be allowed to practise the law in any shape or form, and that all legal business of whatever kind should be indiscriminately swept into their net. Unfortunately for such persons, however, this dog-in-the-manger principle and wish are not allowed to operate, as the following quotations will prove:—"The largest and most lucrative part of the employment of Law Agents consists, in most instances, of extrajudicial work, such as conveyancing, the management of landed estates and house property, advising in trust and family matters, and attending to private Bills in Parliament. Business of this kind is, however, not monopolized by Law Agents, but is largely shared by Notaries Public, etc. (Begg on Law Agents, 1st ed., p. 75). The rule has further been expressed as follows:—"There is practically but one kind of business, and it the least remunerative—appearances in the Sheriff Court—from which Notaries are excluded" (Scot. Law Rev., 1888, p. 115). And according to the admission contained in the memorial recently presented by the Council of the Incorporated Law Society to the Court of Session, the privileges of Notaries "within their sphere are equal to those of Law Agents." These quotations, it is thought, should sufficiently dispose of the absurd idea that the effect of the certificate now issued to the Notary is to confine him to "purely notarial work."

There can be no doubt, however, that the legislation of the last fifty years has had the effect of causing a very large amount of the work which was formerly performed solely by the Notary Public pure and simple, to be shared by the "Law Agent." This result has been brought about by the Acts of Parliament that have been passed to facilitate, simplify, and cheapen the Scottish system of land transfer. To such legislation the Notaries have no earthly objection, as they have as strong a desire as their brethren of any of the other branches of the profession, for useful and beneficial legislation. Notwithstanding this result, however, the Notary still continues to draw a fair share of his income from conveyancing work connected with land, and also from his business of general conveyancing and law work. If any rights and privileges have been infringed, the "Law Agents" have been the aggressors, and not the Notaries.

For these privileges the Notary Public has not only to incur considerable preliminary expense, but he has also to pay the self-same annual licence as the "Law Agent" (Stamp Act, 33 and 34

Vict. cap. 97, sec. 63, and relative schedule). In the words of the late Lord Deas, "A Notary Public pays the same amount of licence as a Writer to the Signet" (*Aitken v. Kirk*, 1876, 3 R. 598). It will thus be observed that, under the Stamp Act, the Notary Public is placed at a certain disadvantage, having to pay the same duty as the "Law Agent," without being entitled to the same privileges as to practice. "And these people pay the taille ! And you want further to take the salt from them" (*Memoires de Mirabeau*, ii. 186).

One of the stock averments on the part of the grumbling and meddlesome "Law Agents," in their "Away with him, away with him" crusade, is to the effect that the Notary Public is not an efficient or qualified legal adviser or practitioner. The recent declaration by the Judges' Committee of the Court of Session and the experience of the profession, however, fully disprove this piece of presumption. It may at once be said that the average Notary is as safe and reliable a legal adviser and practitioner as the average "Law Agent." A member of the public, when selecting a solicitor, generally prefers to select the one who he thinks is most capable of attending to what is required of him in a satisfactory manner, and does not stop to weigh and scrutinize the value of a degree, or the supposed and doubtful benefit of a man's being a member of any legal society or branch of the legal profession. As is well known, there are good, bad, and indifferent practitioners in every branch of it; such has always been the case, and nothing short of a miracle will make it otherwise. The solicitor thus selected by the client is very often one whose whole qualification is that of Notary Public; and it is here that the shoe begins to pinch the sensitive "Law Agent," who immediately shrieks out something about an *unqualified* practitioner having been engaged, and, from his conduct, one would almost begin to question whether the Notary Public had any rights or privileges at all, or whether he was an impostor or something worse. We ask for proof of this want of qualification, but ask in vain, as there is none. The liabilities incurred by the Notary Public and the "Law Agent" for the due discharge of their duties and obligations to clients are identical (*Aitken v. Kirk*, 1876, 2 R. 598); and experience has proved that the proportion of agents who have failed to discharge these duties properly and efficiently is not greater in the one case than in the other. Surely this goes a long way in meeting the vile insinuations with which the Notary has been assailed. There are Law Agents and Law Agents, just as there are Notaries and Notaries; and all this hue and cry on the part of the former about the efficiency and qualifications of the latter, may be simply gathered together and labelled "*Bosh*." As the Lord President Inglis remarked in *Aitken v. Kirk*, "It is the client's business to see and know that the person he employs is properly skilled." This remark seems to be founded on the great and wholesome rule of natural selection.

Were the Notary an unqualified or inefficient practitioner, the fact would very soon become manifest, and no person would be foolish enough to employ him, just as no person would employ a "Law Agent" who was known or reported to be unsafe. Clients, in selecting a solicitor, may be safely trusted to do so in the manner most in accordance with their own interests, and no unnatural barriers should be allowed to exist which tend to thwart their right of free selection. This rule of natural selection is one of universal application in all professions excepting that of the law, and is recognised in all spheres of society; and the arguments deducible from it are indeed made use of by the "Law Agent" himself, when he finds it convenient or suitable for his purpose to do so. At the present time the principle is in great demand, and is doing yeoman service in the agitation for the fusion of the advocate and "Law Agent" branches of the profession. The articles that have appeared in support of that movement—abounding, as Carlyle would put it, in "elisions, sudden whirls, quips, conceits, and all manner of inexplicable crotchets"—are well known to all readers of current legal literature, and therefore need not be extensively quoted here. So far as the "Law Agent" is concerned, the agitation may be said to have liberty of action for the lawyer, and freedom of selection for the client as its key-note. The principal arguments adduced by the "Law Agent" in support of the movement, when reduced to the concrete, appear to be the following:—That the lawyer can best serve his client by having the right to perform all the work the client may have for him to do. That he is prevented from doing so by an artificial distinction or line of demarcation, which is antagonistic to the principle of natural selection, and is not in harmony with the course of modern business and affairs. That this artificial distinction is based upon the principle of monopoly, which does not commend itself to the general opinion of the country. That the "Law Agents," as a body, are perfectly fit and competent to undertake the duties of the advocate, and *vice versa*. That the wishes of the client should be consulted and given effect to, and that the monopoly in question throws additional and needless burdens on his shoulders. It is humbly thought that every one of these arguments may truly be said to apply with greater force to the proposal that has been made, viz. that the rights and privileges of the Notary Public should be co-extensive with those of the "Law Agent"—in short, that the offices of "Law Agent" and Notary Public should forthwith be merged and welded into one.

Here, however, that terrible and ubiquitous creature known as the Notary Public is not forgotten, and is treated with the usual degree of candour and fairness. "Fusion would give more scope for specialism, and it is the specialist who is able best to serve his employer. The tendency this way has been very strong in recent years at the London Bar, and in the medical profession every con-

siderable town affords instances of successful specialism. There is a bastard kind of specialism which the Act to effect fusion might very wisely extinguish. We refer to the Notary Public, whose province of practice bears no relation to his certified qualifications. The back door by which he enters the profession should be closed, or he should be restricted to the noting of bills and extending of protests, and to the expediting of notarial instruments drawn by qualified conveyancers, of whom he cannot be supposed to be one" !!! (Scot. Law Rev., 1888, p. 43). It would be difficult to find a more pronounced example than this is of combined selfishness and impertinence. As the Notary enters by the same door as the Writer to the Signet, it follows as a natural consequence, if this "back door" theory is correct, that the Writer to the Signet is also an unqualified practitioner, bastard, and interloper. Fortunately there is sufficient authority to overthrow both these conclusions. Here it is. Since 1754, says Mr. Henderson Begg, in the first edition of his *Treatise on Law Agents*, p. 10, "the Writers to the Signet have formed the principal and most numerous body of legal practitioners in Scotland, and hold the highest rank in the profession;" and, said the Judges' Committee appointed to inquire into and report upon the mode of admission of Notaries, "since the passing of the Law Agents Act, the Court has admitted as Law Agents all who have passed as Writers to the Signet, without requiring them to undergo any examination under the Law Agents Act, the reason being that the Writers to the Signet themselves, by members of their own body, conduct examinations of apprentices and applicants for admission to the membership of the Society, such as the Court considered to be sufficient and satisfactory." Then, as regards the Notaries, the Council of the Incorporated Society of Law Agents reported to the annual meeting of the Society, held in Edinburgh on 20th September 1888, that it is now "impossible for any one who does not possess legal knowledge equal to that of an intransigent to the Writers to the Signet body, to be admitted a Notary."

These oddities and pieces of presumption are all very amusing, and it is indeed hard to believe that the writer is serious when giving vent to such exceptionally strong opinions. But whether he is or not, he will experience great difficulty in getting many others to honestly concur with him. His opinion and remarks are founded on prejudice; he views the Notary question with what may be termed jaundiced eyes, and his conclusions are therefore practically worthless. The unfortunate thing for the "Law Agents" who hold and endorse such opinions is, that they are not supported by facts. They are opposed to the general experience of nearly every member of the profession, and received scant countenance when the Incorporated Society of Law Agents recently presented a petition on the subject to the Court of Session. That Society did not and could not make such averments, and humbly con-

tented themselves with expressing their opinion, "that it would conduce to the higher qualifications of Notaries that applicants should serve an apprenticeship and attend law classes in an university; but they were not desirous to press these views with undue persistence, nor to exclude those who by private tuition and reading could fully qualify themselves." They might at the same time have pointed out that the university attendance which they sought to have imposed upon Notaries, is *not* imposed upon "Law Agent" candidates. And here it may be remarked that the Notaries Public as a body are as anxious as any other branch of the legal profession to improve the status and standard of education of its members, and that any honest and beneficial legislative proposal having this object in view will receive their hearty co-operation. They would be fools, however, if they tamely submitted to any legislation which ignored their claims, rights, and privileges; and strait-laced, microscopic "Law Agents" need never expect them to quietly agree to the signing of their own death warrant, or to any legislation detrimental to their interests.

There are one or two other points in connection with this question which, with your permission, will be discussed in a future number of the *Journal of Jurisprudence*.—I am, etc.,

NOTARY PUBLIC.

AMERICAN INTERNATIONAL CONGRESS OF MEDICAL JURISPRUDENCE.

(To the Editor of the *Journal of Jurisprudence*.)

DEAR SIR,—The Medico-Legal Society of New York has decided to hold an International Congress of Medical Jurisprudence, at which representatives from all countries will be invited to attend and contribute papers.

The immense progress made in this century in the sciences of biology, neurology, psychiatry, physiology, psychology, and toxicology, have enhanced our knowledge of the functions of brain, nervous organization, and elevated medico-legal science to a higher rank than it ever occupied before. The application of justice is governed by a higher sense of humanity with our increased knowledge of the physical organization of the human mind. The conviction has therefore gained ground, that medicine and jurisprudence must combine closer for a clearer definition and the better understanding of the principles that are rooted in both branches of learning, in the exercise of functions which require practical application in the government of society. This is the

special field of medico-legal science, and it calls for the most intimate relationship between the faculties of medicine and of law. Eminent men in both hemispheres have rendered great services in the elucidation of the great principles underlying medico-legal science. In most of the European countries forensic medicine is taught by great specialists attached to the universities, and the same is done in some of our own colleges; nevertheless there is no uniform practice in the application of these principles to the administration of justice. The Courts in Germany obtain the opinions of experts officially attached there, which are, however, often disregarded; and neither in this country nor in Europe are the Courts bound by the professional opinions of the medical expert. The divergence of views must be greatly ascribed to the obscurity which still surrounds certain scientific facts outside of the medical profession, the necessary effect of the absence of intimate and close relationship between the faculties of law and medicine.

To bring about a nearer approach of the two learned professions in the interest of medico-legal science, and a more uniform application of its principles throughout the civilised world, our Society has determined to invite the votaries of medico-legal science, the men who have attained eminence in the professions of medicine and law in any part of the world, whose voice will be heard with that respect which is accorded to authority, to meet at an international Congress, to be held in the city of New York during the year 1889, at such a place and time as will be determined later on.

In issuing this call, we voice the sentiments of leading jurists and alienists, of prominent members of the bar, and the medical faculty of our whole country; and we may promise to all the gentlemen who will attend, a cordial welcome by our citizens and members.

A Congress like this will advance mightily the cause of justice and humanity, and will pave the way for a clearer definition of the principles which should govern the administration of justice in our enlightened age. The intercourse between men eminent in their profession, the exchange of views between them, the treatment and discussions of questions that form an integral part of both law and medicine by those whose voices are recognised as the leaders of science, will form another link in the universality of all true science.

The Congress will hold a session of four days. Members of the Medico-Legal Society will entertain as guests all foreign visitors, and arrangements will be made for reduced rates of ocean and railway travel for those who attend from a distance.

The leading societies, home and foreign, who are pursuing kindred studies, are invited to send delegates.

The Sub-Committee which now has the affair in charge is composed as follows :—

SUB-COMMITTEE ON INTERNATIONAL CONGRESS OF MEDICAL
JURISPRUDENCE.

Moritz Ellinger, Esq., Chairman.

Clark Bell, Esq. Dr. Isaac Lewis Peet. Stephen Smith, M.D.
Judge Noah Davis. E. W. Chamberlain, Esq.

The Chairman of the Sub-Committee, Mr. Moritz Ellinger, is the Corresponding Secretary of the Medico-Legal Society.

Members of the Society residing in the various States of the Union, or the Canadas, will be entertained by the resident members, on the same footing as foreign delegates or invited guests.

All active, honorary, or corresponding members who will contribute papers to be read at this Congress, will please forward their names and the title of their papers to the Secretary of the Sub-Committee or to the President of the Society, at No. 57 Broadway, N.Y. City.

Officers of scientific bodies in sympathy with medico-legal studies, will please lay this announcement before the members of their societies.

All students of forensic medicine, or its kindred and allied sciences, are invited to attend and to contribute papers to be read. We request you to inform us of your decision, and of the subject which you may eventually desire to speak upon, or the treatise which you may submit. The sooner you can communicate your pleasure to us, the more you will facilitate the labours of the Committee who are charged with the necessary preparations for the work.—We are, etc.,

CLARK BELL, *President.*

MORITZ ELLINGER, *Cor. Secretary.*

NEW YORK, 10th October 1888.

Reviews.

A Manual of the Constitutional History of Canada, from the earliest period to the year 1888; including the British North America Act, 1867, and a Digest of Judicial Decisions on Questions of Legislative Jurisdiction. By JOHN GEORGE BOURINOT, LL.D., F.R.S. Can., Clerk to the House of Commons of Canada, Author of "Parliamentary Practice and Procedure in Canada," "Local Government in Canada," etc. Montreal, 1888. Dawson Brothers.

DR. BOURINOT is the Erskine May of Canada. His large work on the Parliamentary Practice and Procedure of Canada is well
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known in this country. The present treatise is mainly a revision and republication of certain chapters of that larger book. Those chapters having been, as he tells us in a prefatory note, placed on the list of books required for the study of Political Science in the University of Toronto, he has thought it desirable to publish them in a separate volume, "with such additions and alterations as will make the sketch of the Canadian Constitution, as it appeared originally, complete down to the present time." The result is eminently satisfactory. The author has given us, in very moderate compass and at an equally moderate price, an excellent and very complete treatise. The opening chapters contain a history of the Constitution. The French *régime* is dismissed in a few pages, the history of Parliamentary institutions in Canada beginning only with the termination of France's possession in 1760. But since the end of the eighteenth century the country has made marvellous advance in the development of a Constitution; and when Dr. Bourinot, after his concise historical sketch, comes to set forth the Constitution under which the Dominion is so prospering to-day, he has an admirably well-ordered and perfected system to describe. His exposition of it is clear, succinct, and complete. Every statement in it is down to date. We can heartily recommend the book to readers in this country who wish to understand the Constitution of Canada. In nine short chapters, in about one hundred and twenty pages in all, one can acquire in this work a sound general knowledge of the system, which is, as Dr. Bourinot remarks (certainly without exaggeration), "now attracting considerable attention in other countries." We may observe that the index seems to us scarcely worthy of the body of the treatise; but the work is so systematic in itself that this defect will be the less felt.

Digest of the Scottish Law of Conveyancing: Moveable Rights. By JOHN CRAIGIE, M.A., LL.B., Advocate; Author of "Digest of the Scottish Law of Conveyancing: Heritable Rights." Edinburgh: Bell & Bradfute. 1888.

Mr. Craigie has now followed up his work on the writs relating to heritable rights by a digest of the law of conveyancing of moveable rights. The latter is necessarily more voluminous than the former, both from the relative extents of the two subjects and from the fact that it is only in the more recent treatise that the author has dealt with the group of matters common to deeds whether they relate to moveable or to heritable rights. But, even allowing for these considerations, the discrepancy in size between the author's two digests—150 pp. and 500 pp. respectively—is only to be explained by the fact that in his second work, that now under review, Mr. Craigie has treated his subject far more fully than he

did that of heritable rights. A comparison of the kind is not easily made. But the impression to this effect with which one rises from a perusal of the book is confirmed by the announcement, made in its preface, that a new and "enlarged" edition of the previous work is to be issued next year. It may be open to doubt whether this can be regarded as altogether an improvement. Mr. Craigie writes, professedly and obviously, for students; and, in digests having that aim, brevity cannot be profitably dispensed with, no matter how concise may be the statement of various subjects included in the book. Brevity, in fact, it seems to us, is the sole justification for the appearance of a new work on the law of conveyancing. For exhaustive treatment there are already books in plenty. Mr. Craigie has, nevertheless, given us a carefully prepared digest of the law. It is clear in its exposition, and very full in its references alike to principles and to authorities. The work ought to be very popular with students.

Appointments.

HER MAJESTY has been pleased to confer the office of Lord Justice-Clerk, vacant by the retirement of Lord Moncreiff, upon the Right Hon. J. H. A. Macdonald, Q.C., M.P., C.B., LL.D., Lord Advocate for Scotland. Lord Justice-Clerk Macdonald is so familiarly known, and has in recent years been so prominently before the public in many spheres of public life, that any recapitulation of his public services and many distinctions is unnecessary here. We note that this is the fourth occasion in succession in which the Lord Advocate has been appointed Lord Justice-Clerk. Lord President Inglis is the only one of the four who has been fortunate enough to attain further promotion to the Lord President's chair. We observe with pleasure that the Lord Justice-Clerk is to maintain his connection with the Volunteer force. If his Lordship should throw the same energy and assiduity into the discharge of his judicial work, which he has displayed in his command of the Queen's Brigade, he will not walk unworthily in the steps of his distinguished predecessors.

It has been quite understood for a fortnight at least that the Hon. H. J. Moncreiff, Sheriff of Renfrewshire, has been offered and has accepted the seat on the Bench vacant by the death of Lord Craighill. If this be so, why the appointment has not been publicly announced and formally carried through is a matter which passes all understanding. As we are passing through the press Mr. Moncreiff's appointment is officially announced. It is persistently stated that this appointment was the result of an

arrangement in connection with the retirement of Lord Justice-Clerk Moncreiff. This is not the case. We have the best authority for stating that no such arrangement existed and no negotiations took place. The judgeship was, in fact, we believe, offered to another before Mr. Moncreiff. The new judge is an excellent lawyer, and an amiable and accomplished man. His standing at the Bar, however, in view of the claims of others, of itself hardly warrants his appointment at this juncture, which he owes partly to the desire of the Government to conciliate their Liberal Unionist supporters, partly to the fact that his accession to the peerage would render it impossible for him to practise at the Bar or hold any subordinate office, partly to the distinguished public services of his father, and partly, perhaps, to the fact that the persistent though baseless reports of an "arrangement" had so impressed people's minds with the expectation of his promotion, as to make it appear the most natural thing in the world to offer him the appointment. We heartily congratulate Mr. Moncreiff on his promotion, and we have no doubt that he will prove a thoroughly sound and safe judge.

THE Solicitor-General, Mr. J. P. B. Robertson, Q.C., M.P., has been appointed Lord Advocate in room of the Lord Justice-Clerk. Lawyers more learned have held the appointment, but it may be doubted whether any Lord Advocate has entered office with as brilliant prospects of political and parliamentary distinction since Henry Dundas presented his commission.

MR. MOIR T. STORMONTH DARLING has been appointed Solicitor-General in room of Mr. Robertson. Mr. Darling is hardly of the same strictly professional standing as some recent holders of the office, but any defects in this respect are compensated for by business capacity, long political experience, and an admirable address. No appointment could have given greater satisfaction in the Parliament House.

MR. JAMES FERGUSON, Advocate, has been appointed an Extra-Advocate-Depute upon the Glasgow Circuit, in room of Mr. Duncan Robertson, recently appointed an Advocate-Depute.

SHERIFF-SUBSTITUTE HAMILTON, Portree, has obtained six months' leave of absence owing to ill-health, and Mr. William Dunsmore, Advocate, is to discharge the duties of the office in his absence.

Official Dilly-Dally.—Much irritation has been occasioned by the delays in filling up recent legal and judicial vacancies. Such delays are the more inexcusable when, as is understood was the case with most of the recent appointments, there was never any doubt as to the persons on whom they were to be bestowed. Delay not only impedes and disorganizes public business, but it gives an uncomfortable sense of feebleness and fumbling in high places, and takes away half the grace of the appointment when it comes.

The Month.

The Re-assembling of the Court of Session.—The Court of Session resumed its sittings for the winter session upon Tuesday, 16th October. For nearly four years the annual re-assembling has seen an unbroken *personelle* upon the bench, but on this occasion there were two vacant chairs. The Parliament House knows Lord Moncreiff and Lord Craighill no more, and the change was rendered all the more impressive by the fact that there was none of the bustle of new elevations, the successors of these judges not having received their commissions.

* * *

The Lord President on Lords Moncreiff and Craighill.—On taking his seat on the bench of the First Division, the Lord President made appropriate reference to the losses which the Court had sustained. He said—"My Lords, we begin the winter session in circumstances unusually serious and impressive. We lament the death of Lord Craighill as of a highly esteemed colleague and friend, who secured the respect and confidence of the profession and the public by his talents and acquirements as a lawyer, and by his honourable and upright conduct as a judge, while to those who knew him intimately, he was endeared by his amiable disposition and the purity of his life. But we have to face another and still more important event in the resignation of Lord Moncreiff. His long and distinguished career, as well in private as political life, is known to all men. For nearly twenty years he exercised a powerful and beneficial influence in the legislation affecting Scotland, and for the same period his active, intelligent, and vigorous administration of Scottish affairs in the office of Lord Advocate was watched by the people of this country with approval and satisfaction. It is no small praise that he should have passed through this long ordeal with a reputation so high and so well sustained. He brought to the discharge of his judicial functions a mind well stored, not only with professional learning, but also with the fruits of more extensive and liberal studies, which are equally essential to complete the character of a great advocate or a great judge. Of my personal feelings on this occasion I find it difficult to speak. An unbroken friendship of nearly seventy years' duration is a bond of union of no ordinary kind. And the many relations in which Lord Moncreiff and I have stood towards one another, alternating alliance and opposition both forensic and political, combined with constant social intercourse, have given us singular opportunities of judging one another, and I fondly believe that the result has been mutual respect and affection. He retires from active life full of years

and of honours, in the enjoyment of all that which should accompany old age. Among his 'troops of friends,' I am sure he will believe that none are more sincere in their wishes for his happiness in retirement than those who have been his colleagues on this Bench."

* * *

THERE was no response from the Bar, the Dean of Faculty not being in his place, and having apparently been unaware that a eulogium was to be pronounced from the Bench. We are not fond of borrowing from England, but we confess that we prefer the English custom, in accordance with which, on such impressive occasions, the sentiments of the Bar find audible expression in response to those of the Bench. Such a form of expression is, in our view, far more touching and gracious than any formal minute, however elegant and elaborate.

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LORD M'LAREN was not in his place at the opening of the Court, and we much regret to learn that he has been obliged, owing to the state of his health, to apply for a term of leave of absence. Mr. Charles Taylor, too, the interim Principal Clerk in the First Division, has been obliged to seek retirement, which we trust will only be temporary, owing to a somewhat serious affection of the eyesight.

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The Royal Courts of Justice.—During the long vacation the whole of the courts of the Royal Courts of Justice, London, have been thoroughly overhauled, with the view of ascertaining whether there are any structural defects, such as the one which caused such alarm a short time since in the Queen's Bench Court, occupied by Baron Huddleston, when one of the supporting beams of the roof was found to be in a dangerous condition, in consequence of its having shifted out of its place about an inch and a half. It has not transpired that the overhaul has disclosed any more errant beams.

* * *

The Sham Clergyman.—An Act was passed during the present session of Parliament to declare valid the marriages solemnized by the sham parson Ellis in Suffolk. Our Scots marriage laws are much abused, but anything seems preferable to a system under which the validity of a marriage, between two persons free to marry, may depend upon facts entirely beyond the cognisance of the parties to the contract.

* * *

Mrs. Gordon Baillie.—Mrs. Frost, the notorious adventuress who is known by that name, was sentenced the other day by the

Recorder to five years' penal servitude for swindling. We have little doubt that the sentence was well deserved, but we cannot forbear commenting upon the procedure after the verdict was returned. A police official was allowed to go into the box, and to depone to a long career of alleged swindling on the part of the prisoner. What was the meaning of this? The Recorder is in this dilemma, that either this evidence had no influence upon his sentence, in which case it was irrelevant and ought not to have been received; or else it influenced his sentence, in which case the prisoner was sentenced for offences for which she had never been tried. As the Recorder allowed the evidence to be received, we have no doubt that by English criminal practice it was admissible. But whether admissible or no, we do not hesitate to characterize the reception of such evidence as monstrous. The prisoner had no notice and no opportunity of meeting the charges of the police official. If such procedure be competent, there is no reason why a prisoner convicted of stealing a bun should not be sentenced without further trial on the *ex parte* statements of police officials for a series of bank robberies.

* *

Weed or Wed.—Sheriff Berry has decided what was known as the "Cigar Breach of Promise Case," in which a young woman sued for damages a young man who broke his engagement with her rather than break off the disgusting habit he had formed of actually smoking cigars! The Sheriff adheres to the interlocutor of his Substitute dismissing the action. In his note he says, that "in support of pursuer's claim of damages it was stated that it was part of the contract of marriage that the defender should abstain from smoking. Looking to the condescendence, however, the Sheriff cannot find a sufficiently distinct averment that before the parties agreed to marry she made it a condition of the agreement that he should abstain from smoking. The stipulation itself was of such an unusual and trifling character in relation to a contract of the highly important nature of an agreement to marry, that it would require a very distinct undertaking to that effect to induce the Sheriff to regard it as forming an essential part of the contract. Into the question whether the pursuer was better without the defender the Sheriff does not enter. It is enough that her case as set forth on record is not sufficient to entitle her to a proof." A good many naughty smokers, we fear, will think that defender was better without the pursuer.

* *

Society of Solicitors and Procurators of Stirling.—This Society held its annual general meeting in the Procurators' Room, County Buildings, Stirling, on Tuesday, 2nd October last. The following office-bearers were appointed for the ensuing year:—Dean, Mr.

D. W. Logie; Sub-Dean, Mr. E. Gentleman; Secretary and Treasurer, Mr. Chas. Wingate; Procurators for the Poor, Messrs. D. W. Logie, and John G. Currer; Dean's Council, Messrs. A. C. Buchanan, Wm. Donaldson, R. Whyte, D. White, Alex. Jenkins; Board of Examiners, Messrs. D. W. Logie, R. Whyte, C. Wingate, *ex officio*; Fiscal, Mr. John Muirhead; Curator, Mr. James Brown; Keeper of Library and Officer, Mr. Robert Brunton.

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Professor Rankine on Legal Topographics.—The department of case law does not present an attractive appearance from the outside. To a beginner, or rather to one about to begin, it must appear to be dry even for a legal study, and formidably voluminous. In his inaugural lecture at the opening of the winter session of the Scots Law class in the University of Edinburgh last month, Professor Rankine hit upon an ingenious device for arousing the interest of his students in this important subject. Premising that there is probably not an acre in all Scotland which has not at one period or another been the subject of litigation—surely an appalling truth!—he advised his hearers to make themselves acquainted with the various points of law which had been decided in disputes arising in the several localities from which they came. This appeal to parochial patriotism will no doubt prove the incentive intended. Then the professor started with his class on an imaginary tour round the city of Edinburgh, and pointed out how at every turn they were met by the scene of some famous lawsuit. Certainly the capital of Scotland has contributed its full share of subject-matter for Closed Records, and the lecturer had abundant material.

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The Incorporated Law Society of the United Kingdom.—This Society held its annual provincial meeting this year at Newcastle. A variety of subjects of more or less interest to legal practitioners were as usual discussed. There was, of course, a paper on "The Fusion of the Legal Profession." The writer of it relied greatly on statistics to make out a case for the "Fusion." The fact that most colonial and foreign states have only one branch of the profession was taken by him to be a great argument against the separate system. To most people it will appear, to say the least of it, novel that an ancient and highly developed judicial system like that of Great Britain should be called upon to shape itself in accordance with the crude and rather primitive forensic institutions of recently set up states, or of countries which, though old in years, have but recently acquired that liberty which is essential to the perfecting of the legal machine. The writer then justified the proposed change, on the ground that it would save expense to the client—a

fact which has not been established by proof, and of which we are more than sceptical;—and from the region of statistics and argument he passed into the region of prophecy. The “Fusion,” it was remarked, is sure to come—“sooner or later.” Another member then read a paper on “Amalgamation or Reciprocal Transfer.” This did not, as might be supposed, refer to anything chemical. It, too, was a legal paper, and dealt with the same subject as the preceding, but from the opposite standpoint. This gentleman condemned the change; and stated his conviction that, if the solicitors in the kingdom could be polled, the vote would be overwhelming against it, both in their own interests and in the interests of the public. He proposed a motion, which was carried, to the effect that it had not been shown that any such change was called for; but recommending an application to Parliament to make reciprocal the facilities given by the 1877 Act to barristers of five years’ standing for becoming solicitors. This is the sound way of dealing with the question. It recognises the advantage of specialization, and seeks to preserve the conditions of it; while, at the same time, the proposal rightly provides greater facilities for solicitors who may desire to exchange into the other branch of the profession. At the meeting, Mr. A. P. Purves, Edinburgh, read a paper “On Arrestment to found Jurisdiction in Scotland, with special reference to the Action *Parnell v. Walter*, etc.” The writer treated the subject very exhaustively, and in an elementary way, which must at last have conveyed to his English hearers a competent knowledge of this Scottish process, which does not altogether commend itself to them.

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The National Bar Association of the United States.—The National Bar Association, which was organized in Washington some months ago, held its first annual meeting in Cleveland, Ohio, August 8. Its objects, as set forth in the Constitution, are to promote the unification, so far as practicable, of the laws of the various States which relate to matters in which the people of the United States have a common interest—such as the laws of descent, of wills and conveyances, of marriage and divorce, of limitations of actions for the settlement of estates, the laws affecting comity between the States, the extradition of criminals, those concerning commercial paper; to study the condition and promote the improvement of the judicial systems of the States and of the United States, etc. It is a representative body, composed of delegates from local Bar Associations throughout the country. There are many particulars, no doubt, in which it is desirable that the laws of the several States should be brought more into unison. In matters of form, as in the execution of instruments, or in matters of mere statutory enactment not based upon or growing out of public sentiment or State traditions, there is no reason why there

should not be uniformity in the laws. The most conspicuous need for such uniformity is probably found in the law-merchant: commerce knows nothing of the sentiment of a people, which usually regulates the descent and distribution of property, and underlies their laws of marriage and divorce. There is no good reason why a negotiable note should not mean the same thing in every jurisdiction, nor why the laws governing its presentation, acceptance, protest, payment, and discharge should not be the same. We think that there are some subjects embraced within the list set out in the Constitution, and recited above, with which the Association would do well not to meddle. But within its legitimate scope there is room for useful work, and its organization is well adapted to perform it. It will act through the local Bar Associations in the several States, and thus exert an influence which would be impossible to a body composed of individuals. This has been the weakness of the American Bar Association, and is the reason why its excellent work has not made more impression upon the jurisprudence of the country. At the Cleveland meeting the Association adopted several Acts which the Legislatures of the States will be asked to enact into laws, and discussed others which will be taken up at the next meeting, to be held at the White Sulphur Springs, July 31, 1889.—*Virginia Law Journal*.

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Cross-Examination Touches.—We once knew an eminent lawyer who was frequently retained as counsel for the trial merely on account of his face, which expressed the emotion necessary to the occasion with wonderful power: he would look virtuous, or sorry, or injured, or indignant, and without a word would thus play an important part. Another had snorted many a witness down and many a cause out of Court by a certain contemptuous noise which we believe he must have acquired by studying the walrus tribe. It is said that the celebrated Daniel Cady was wont to produce a profound impression by nodding assent to the propositions of his associates, and wagging a vigorous negative to those of his antagonist. When William A. Beach thought an adverse witness too hard a nut for him to crack, he sometimes would dismiss him with a withering look, observing: "I have no questions for *you*, sir," in a tone that implied, "Depart, thou cursed!" We have seen a perfectly fair witness cringe under this treatment, and an awful hush come over the gaping audience. Mitchell Sanford produced a tremendous impression on us once, in an address to the jury, by exclaiming, "Thus far may prejudice and oppression come, but here shall their proud waves be stayed," at the same time slapping the rail of the jury box. This was a touch only practicable where the jury sat in a pen, and the second time we heard Mitchell perform it we were less impressed. Still it no doubt had an effect on the jury unfamiliar with it. Many

of our local Bar will recall Henry Smith's various powers as an actor. His manner was frank, or magnanimous, or satirical, or humorous, as the moment required, but was never more effective than when it expressed a real pity that his antagonist was not making out a better case. Porter must have been worthy of study when he was allowing Guiteau to get the better of him in that famous cross-examination. We all know the trick of pretending to have no questions for cross-examination, and just as the witness is going off the stand suddenly recalling him with, "Oh yes, I have overlooked one inquiry," and then asking a perfectly fatal question "in a casual, offhand way." We all know the cross-examiner who pretends indifference and sleepiness, and who almost yawns as he asks two or three vital questions, when he is really on pins and needles of suspense. We all know the polite counsel, the conversational counsel, the jocose counsel; also the cold and awful counsel, and the counsel who implies eternal torments in his manner. It is a great art to adapt one's manner to that of the witness, to meet him on his own ground, as it were. A most amusing instance of this we once saw, where the witness, a retired camp-meeting exhorter, was testifying in "the nasal twang heard at conventicle," and in a sort of godly fervour addressing a long narration to the jury as if they were twelve sinners. The opposing counsel instantly seized the situation, and at appropriate intervals gave stricken groans, and exclaimed, *sotto voce*, "Amen, brother!" and when the witness desisted, appeared quite downcast and too penitent to ask any blasphemous questions. This treatment completely broke up the audience, the jury, the Bar, and the judge, but the witness evidently was unconscious of the sensation.—*Albany Law Journal*.

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Chief-Justice Fuller.—The Honourable Melville W. Fuller of the Chicago Bar has been appointed Chief-Justice of the United States. The new Chief-Justice is a native of the State of Maine and a graduate of Bowdoin College. He has been raised directly from the Bar to his present dignity. The appointment was not made without difficulty, for the Republican majority in the Senate were slow to fall in with the President's renomination. At last, however, in deference to very strong public and legal opinion, they gave way, and Mr. Fuller was appointed. Singularly enough, as only five Lords President of the Court of Session—Blair, Hope, Boyle, Colonsay, and Inglis—have taken their seat upon the bench during the present century, so only five judges have, during the like period, attained the highest judicial office in America. Marshall served thirty-five years, Taney twenty-eight, Chase nine, and Waite fourteen.

"Yesterday's ceremony," says the *New York Herald* of October 9th, "was therefore a rare one in our history, and the event was one

of unusual importance, for it marked the ascension to an office which, in dignity, is hardly second to the Chief Magistracy itself, and in power is even superior to the Presidency. No President, for example, has ever exerted the influence that Chief-Justice Marshall did in shaping our constitutional law and form of government, and no future President will be able to exercise the power in that direction which may be wielded by Chief-Justice Fuller. This results from the authority vested in the Supreme Court, an authority often turned by one member to interpret the federal Constitution. That instrument outlines the prerogatives of the President, the powers of Congress, and the rights of States. But it is for the Justices of the Supreme Court to interpret the Constitution—to declare what it means. In doing this, a majority of these nine men may limit or enlarge the powers of the President, of Congress, or of the States—may, in short, make or unmake the fundamental law of the country. Did not the Supreme Court at one time deny, and at another concede to, Congress power to make anything a legal tender? Has it not at times gone far in the direction of centralization, and at others in the direction of State sovereignty? It has never been the custom for an incoming Chief-Justice, as it has been for an incoming President, to make an inaugural address. If such an address had been in order yesterday, Mr. Fuller would have found a timely theme in the condition of the business pressing upon the Court. The Court is at least three years behind with its docket, which is steadily growing longer instead of shorter. That means that litigants must wait three years for a hearing of their cases and an adjudication of their rights. Such a delay, with its attendant losses and vexations, is little less than a denial of justice. An evil of this magnitude cannot too early receive the attention of Congress."

A banquet was given to Mr. Chief-Justice Fuller by the Chicago Bar Association, in honour of his appointment as Chief-Justice of the United States Supreme Court, on Monday, 24th September, at the Palmer House, and was attended by nearly 400 guests. As the Chief-Justice is the head of the Court which, next to our own Privy Council, exercises the widest sway in the world, and as the speeches were replete with matter interesting to the legal profession, we give here a report of the proceedings.

At a few minutes past seven o'clock, the column, headed by Judge Thomas Drummond, the chairman, and the Chief-Justice, composed of the leading members of the Bench and Bar, and distinguished citizens in the various walks of life, took up its march to the banquet hall, which was beautifully decorated. Behind the high oak chair in which Judge Drummond sat was an arch of green, and across the broad crowning piece was written in roses the name of the Chief-Justice. Surmounting the arch was a floral representation of the scales of justice, and blooming every-

where about the room were banks of crimson roses, arranged with more than ordinary tastefulness.

THE TOASTS.

The toasts were as follows, music being interspersed :—

"Our Guest, Chief-Justice Melville W. Fuller."

"The Bench," Walter Q. Gresham.—Judge Thomas A. Moarn.

"The Bar," Hon. William C. Goudy.—James L. High.

"The Law-makers," Judge Lyman Trumbull.

"Commerce," Charles L. Hutchinson.

JUDGE DRUMMOND'S TRIBUTE TO THE CHIEF-JUSTICE.

At ten o'clock Judge Thomas Drummond rose and said :—

GENTLEMEN, — The members of the Chicago Bar and his fellow-citizens, many of whom I am glad to see here to-night, have assembled on this occasion to show their respect and to prove their confidence to the country and to the world in the man who has just been appointed to the highest judicial office of this country. His friends, members of the Bar, and his fellow-citizens have thought that it was due to him that such a manifestation should be made, particularly under the circumstances which took place after his nomination by the President of the United States to the Senate.

I am going to say a few words, very briefly, as to those circumstances which occurred and with which we are all familiar. The gentleman whom we honour and respect, our fellow-citizen, was opposed for that high office on various grounds, morally, politically, professionally. I intend to say a few words upon each of these grounds briefly.

His moral character was attacked. That was entertained by those who were opposed to the confirmation of a man who had gone out and in among us for more than thirty years with an untarnished name, with a moral character which even malice could not sully, and if you will pardon me, gentlemen, for the remark, a man whom I have always been proud to call and recognise as my personal friend. Even his opponents, out of self-respect, were compelled to abandon that attack at last.

He was opposed on political grounds. I do not know whether my friend agrees in all respects with the political view which he entertained many years ago. I do know that in some of his political views many of his friends coincided, and I, gentlemen, for one. We will let that pass. But it was said that he was not professionally quite up to the mark. Very well, let us look at the men in that high Court who were appointed from the Bar. They admit that they occupied a high position among their professional brethren in the States to which they respectively belong; admit that their characters were above reproach. Does not our friend,

and did he not occupy a high position among his brethren of the Bar in this State, and was not his character without reproach? But it is said he was not generally known in the country. Now this is a very ambiguous term,—what “generally known” is no two men, perhaps, would agree. I recollect in 1856 when I was in Cincinnati, and inquired of a very well dressed, a very respectable looking man, a resident of that place, where Judge McLain of the Supreme Court of the United States lived. He said he didn't know; he had never heard of such a man. Now I do not think that it is expected that to such people our friend would be generally known. It is sufficient if he is known to his brethren of the Bar, to the community in which he lives, to the State of which he is a citizen, and to that part of the country where he resides.

Now, I think to all the lawyers of this part of the country it may be said our friend was very well known. He was certainly known to all men who were able to read the newspapers. He was certainly well known in the State of Illinois. He was certainly well known in the city of Chicago, which now contains double the population of that of the whole State of Vermont.

But it is said by some of our eastern friends, that as we in the west here had the last Chief-Justice, they ought to have had this Chief-Justice. I think that our eastern, our Atlantic, and our Pacific friends, while we accede to them, yield to them all that is their due, and while we claim for ourselves nothing more than is our due and nothing less, still they must believe, as we now do, that in the great central valley between these two oceans the heart of this republic is to be as long as the national life shall last.

I need not dwell upon or enlarge upon the importance of the position to which our friend has been appointed. The magnitude of the questions which shall come before the Supreme Court of the United States cannot, perhaps, be exaggerated. It is to that tribunal we look for the settlement of all our national questions in addition to those which concern the rights of private individuals. On the whole, gentlemen, without occupying your time further, I think I may say that we, as those who have known this nominee and appointee of the President for more than thirty years, can commend him to the public and to the Bar as one who from the eminence which he has occupied as a lawyer, from his learning, from his ability and his integrity, will adorn the high office to which he has been appointed.

Gentlemen, I wish to conclude by this simple remark, that as to these charges which have been made against him, which we one and all repel, your presence here—the members of the Bar, his fellow-citizens—I insist is a vindication and an answer to these charges. Allow me, gentlemen, to ask you to drink the health of our honoured guest, Melville Weston Fuller, Chief-Justice of the Supreme Court of the United States.

CHIEF-JUSTICE FULLER'S RESPONSE.

When Chief-Justice Fuller rose to speak, in response to the toast of his health, proposed by the Chairman, his brethren of the Bar with one accord sprang up again and repeated the cheers and applause with interest. As soon as order was restored, he said :—

I profoundly appreciate the manifestation of kindly feeling toward me personally which accompanies this tribute to the exalted office to which I have been called. I can conceive of no reward of human endeavour, no gratification in the attainment of the objects of human ambition, which can be compared to the affectionate commendation of the friends, the associates, and the fellow-labourers of years.

Centuries ago friendship was declared to be the only thing in regard to the benefits of which all men were agreed. Many despised riches; many shunned great office; many disregarded what most thought worthy of admiration, but all found friendship essential to enduring existence, rendering adversity more supportable and prosperity more brilliant. So, at the close of more than thirty-two years of professional exertion and daily companionship, this assurance of the regard of my brethren and my people is inexpressibly grateful. It illuminates the remembrance of the past, and brightens the anticipations of the future.

In that thirty-two years, the circle, enlarging as they passed, has known many a loosened hand, many a missing face; yet the ties of youth and of advancing age remained, in effect, unbroken, and hold the past, the present, and the future in an indissoluble bond.

When leaving the whispering pines and hundred harboured shores of my native State, I cast my lot with the busy denizens of the rising city of the imperial west, I found here a Bench and Bar which, for learning, accuracy of thought, knowledge of men, eloquence, industry, and skill, were the equals of those of older communities, as, indeed, I need not remind you, since victories are still won or the prizes of victory awarded by many of the veteran field-m Marshals who put their squadrons in the field in that old and far-off time.

If there was sometimes something lacking in the *suaviter in modo*, it was fully made up by the *fortiter in re*—if there was sometimes a little neglect of literary culture, the exigencies of the time did not seem to demand absolute elegance of diction in all cases. The law was their schoolmaster, and familiarity with its precepts led to the knowledge and application of its principles and to strength in their expression. And there was above all an *esprit de corps* which made them a band of brothers, disagreeing only by agreement, glorying in the advancement of their fellows, and jealously alive to the preservation of the integrity and honour of the profession.

In the lapse of these years Chicago has multiplied many times in wealth and population, and more in power, passing from an

overgrown town to a city, and through the baptism of fire from a city to a world in itself, the cosmopolitan centre of a great people; and as litigation has increased and new questions have arisen, the Bench and Bar, reinforced by the steady tide of fresh blood flowing in from every seat of learning, and every quarter whose confines honourable ambition found too narrow for expansion, have kept steadily abreast of the progress of mankind. No problem in any branch of the law but has received adequate treatment and accurate solution at their hands, while as of yore the spirit of fraternity infused through every member of the mass has pervaded, sustained, and actuated the whole.

And it has come to pass that, as the Star of Empire, moving westward, hangs fixed and resplendent above the glorious valley of the Mississippi, a member of that Bar, a citizen of Chicago, has been designated to the headship of the mightiest tribunal upon earth. Of that tribunal, or the grave and weighty responsibilities of that office, it does not become me now to speak, nor could I, if it were otherwise appropriate, for I am oppressed with the sadness inevitable where one, after long years of battle, puts his armour off and retires from the ranks of his comrades.

Whatever the vicissitudes of these thirty-two years, they have never been marred by personal estrangement from my brethren, and they have been happy years. Personally unambitious, I have not thought myself selfish in indulging my preference for the sweet habit of life rather than the struggle involved in prominent position. I have always been deeply impressed with the truth of the words of one of the wisest of mankind, that "men in great place are thrice servants: servants of the sovereign or State, servants of fame, and servants of business, so as they have no freedom, neither in their persons nor in their actions nor in their times;" but I also know, of course, that the performance of duty is the true end of life, and I find consolation in the thought, that though, in the effort to prove worthy of the confidence of a great and common country, I must tread the winepress alone, I shall be sustained by the sympathy, the friendship, and the good-will of those with whom I have dwelt so long, and my affection for whom no office, however exalted, no eminence, however great, can impede or diminish.

And now, gentlemen, wishing you and invoking for myself that blessing without which nothing can prosper, I trust as you accompany me to the ship, we do not sorrow as those who shall see each other's faces no more, but that we part in reasonable expectation that there will be many returns to the home port from the haven for which the bidding of public duty compels me to embark.

JUDGE WALTER Q. GRESHAM ON THE BENCH.

In response to this toast, Judge Gresham rose, and addressed the assemblage as follows:—

Mr. Chairman and Gentlemen,—Society cannot be maintained

without tribunals authorized to hear and determine controversies arising between individuals in their manifold and complex relations. The importance, therefore, of a capable and upright judiciary cannot be overstated. That judicial tribunals are deemed indispensable to the safety and well-being of the people, is attested by the extensive powers which are entrusted to them; and so long as judges are capable, conscientious, and inflexibly independent, they will command respect and their decisions be obeyed.

Judges take a solemn obligation to administer equal and exact justice alike to the rich and the poor, and, however able and rich in learning they may be, they will fail in the discharge of this high duty if not endowed with courage and a robust sense of right. It avails nothing if they are calm, patient, courteous, laborious, and able to see the right, if they are moved by popular clamour, or prejudice, or the frown of power. They may be censured and abused for the honest discharge of their duties, but if they deserve it they will have the confidence and support of the public, including the Bar, upon which their influence and usefulness so largely depend.

It has been said that, owing to the inflexibility of the law Courts are sometimes prevented from administering justice between litigants. Rarely, very rarely, is this the case. If, with capable counsel to aid the Court, injustice triumphs over right, the judge and not the law should bear the reproach. While the binding force of the rules of law, which have stood the test of reason and experience, is still recognised, both in this and other countries a growing disposition is manifested on the part of Courts against sacrificing justice to technicality; and it is not to be expected that with advancing intelligence and civilisation they will be less inclined to see substantial justice administered in the trial of causes.

In ability, learning, and dignity the Supreme Court of the United States, our highest judicial tribunal, is inferior to none in the world. To say nothing of its labours in the exercise of its ordinary common law, equity, and admiralty jurisdiction, it deals with and settles grave questions of constitutional and international law, as well as controversies arising between the States and the United States. It determines for itself the extent of its own powers and jurisdiction, and has conclusively defined the limits within which the other departments of the Government may lawfully act. Powers and responsibilities so great should be entrusted only to men of commanding ability, great learning, and worth. From the organization of that Court to the present time, it has merited and enjoyed the confidence, respect, and veneration of the American people.

Our fellow-townsmen and honoured guest to-night was recently exalted to the position of Chief-Justice of this august tribunal. Knowing him as we do, we entertain no misgivings as to his ability to vindicate the wisdom of his appointment.

MR. JAMES L. HIGH ON THE BAR.

Mr. High, in response to this toast, said:—

Mr. Chairman,—I scarcely know how far a lawyer's post-prandial judgment upon the merits of his own profession may be entitled to consideration by the considerable number of laymen who are present this evening. But it is proper at the outset and for their benefit to correct one or two popular errors touching the real relation which the Bar sustains towards the public.

In our school days we were taught that the human race was divided into five great families or divisions. Later investigations into the origin and destiny of man have demonstrated that this classification is wholly erroneous, and it is now universally conceded by all purely scientific men, including, of course, the entire Bar of Chicago, that the only correct and purely scientific division of the human family is that which arrays them in two great classes, the lawyer and the client. Of these the lawyer properly occupies, as of course, by far the larger space in human economy. The client is merely a sort of necessary adjunct or a convenient background upon which to project the portrait of the lawyer, and he sometimes serves a useful purpose as plaintiff or defendant in a litigated cause. It is not perceived that he performs any other considerable function in human affairs.

Another popular misconception touching the profession, at least in this city, is that its members are accustomed to receive certain pecuniary emoluments vulgarly called fees as compensation for services rendered. It is a matter of simple duty to correct so gross a slander, under which we have too long suffered. There are, it is true, traditions that a few of our seniors, including perhaps such Nestors of the Bar as my brother Goudy or my brother Swett, have in an occasional period of mental aberration been known to accept under protest a modest honorarium from a confiding client. But these are only isolated cases. And the Bar of Chicago constitutes a species of eleemosynary corporation whose 1800 members are constantly going about on a sort of perennial mission of peace on earth and good-will toward men, practising their profession solely for the benefit of their health.

And now, having set ourselves right with our lay brethren, may I say a serious word as to the real function and attitude of the Bar at the present time? It has been often said that the practical and business aspect of our professional life, especially in the large cities, is becoming unduly developed at the expense of its purely professional and scientific features. Undoubtedly the drift is in this direction, and there is danger that the true professional spirit may become dulled and blunted by the commercial tendency which is too prevalent in our calling. And yet this tendency does not imply any necessary decline in professional integrity or in the loyalty of the attorney to the client, since these were never more

conspicuous than now. I believe also that the lawyer's real influence is widening rather than lessening, and that never before since the legal profession became a distinct avocation has its immediate influence upon the affairs of daily life been more direct and far-reaching than in the countries where the common law now prevails. The lawyer has come to be the silent partner in the great mercantile establishments and manufacturing industries. He sits in the directory of the great corporations. He shapes the policy and management of every railway in the land, and his place and function and influence in every avenue of busy life and of human industry are daily becoming more permanent and more assured.

But with this wider influence he cannot, if he would, escape those larger responsibilities which pertain to all the learned professions. We are living in a period of intense activity, of social disorder, and of intense unrest. The great overwhelming problem of capital and labour, beside which all other social and economic questions fade into insignificance; the elements of communism and of socialism which have found lodgment upon our soil, and which have already borne bitter fruit; the relations of the corporate industries of the country to the people,—these are problems of vital moment to every thoughtful man in every calling, and to none more so than in our own. They are questions not of a day or of a year, but for a generation and for all time, and upon their wise solution depends in large degree the future stability of the republic. And upon us, as upon all professions and upon all educated men, there rests the duty to maintain our calling as one, at least, of the conservative forces upon which the safety of our institutions must largely depend.

May I say, also, that we claim for our profession a standard of ethics quite as high as that which prevails in other pursuits. We claim no more than this; we concede no less. It has been too much the fashion to sneer at the ethics of the Bar, and at what has been called the "unscrupulousness of its advocacy," because of a few conspicuous examples of those who have disgraced our calling. We concede such examples; but they are only the exception which prove the rule. We claim no immunity for the guild of law from the common infirmities which taint our human nature, or which attach to all human pursuits. But when I turn to the great judges whose names are woven into the very warp and woof of the common law, and read the story of Coke and Hale and Mansfield; of Nottingham, Hardwicke, and Eldon; of Marshall, and Kent, and Story, and Taney; or when I recall the great advocates whose genius has for ever enriched the traditions of our profession, Erskine and Brougham in the mother country, or our own Webster and Choate and Carpenter, or Benjamin, who enjoyed the rare fortune of distinguished leadership at the Bar of two countries—I am content that the record may be made up and the balance struck as between my own and other avoca-

tions. And I dare to assert for the profession in which my lot is cast, that, not only here and now, but everywhere and always, it may safely challenge comparison in its methods and in its morals with all other professions, whether secular or sacred.

As members of this ancient calling, we are met to commemorate the promotion of one of our number to the supreme judicial seat of the land. The chief executive of sixty millions of freemen has called from his place of honourable leadership at our Bar, one who shall henceforth preside over that august tribunal to whose keeping is for ever committed the ark of our political covenant, the Constitution framed by the wisdom of the fathers as the charter of our national unity. It would be ill-timed in this presence to recount the story of his fitness for the station to which he has been called. But I want no surer judgment upon the wisdom of his selection than the fact, that when the wires flashed the news across the continent, there came a sure and prompt response from the entire Bench and Bar of this city, and of this commonwealth, an unanimous verdict of approval. To have reached by honourable means, and to have maintained for a score of years the very front rank at a Bar whose leadership might well satisfy the most exacting professional ambition, is of itself ample justification, if any were needed, of this well-earned professional promotion.

And yet, my brother Fuller, if to-night we may interpret the emotions of your heart by our own, the thought which is uppermost in all our minds is of the personal and professional loss which we sustain in sundering the ties which have so long united us. I recall, as so many of us must recall, many a hard-fought contest in which we have stood shoulder to shoulder with you, or in which, when the fortunes of litigation may have so ordered it, we have been opposed in honourable contention. Believe me, the ties of fellowship and of comradeship thus engendered are not lightly to be sundered. Neither the dignity of official place, however exalted, nor the outward trappings of official station, shall ever wholly obliterate them. And in the new and wider field to which you are called, when you shall sometimes be wearied with the grave responsibilities of your station, there will, I doubt not, come a frequent longing to resume your place in the ranks, and again to share with your brethren in the friendly contests of old.

Bear with you to that exalted station the benedictions of all your old comrades at the Bar. Commit securely to their jealous keeping and to their assured affection the stainless record of your professional career through all the years of our association. Long and many be the years through which you shall hold in perfect balance the impartial scales of justice. And when at last the record shall be closed upon your judicial career, we who have known you best and loved you most cannot doubt that upon its final page will be written the enduring judgment of Well Done.

The other toasts were duly honoured.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTHSHIRE.

Sheriffs GRAHAME and GLOAG.

ROBERTSON v. WILSON.

Damages for action of interdict—Coterminous proprietors—Servitude—Liability for loss arising from interim interdict.—*Held* (1) that pursuer is entitled to such damages as he can show that he has suffered on account of interim interdict obtained against him by a coterminous proprietor on a mistaken averment of fact; (2) that pursuer's claim is not barred by the fact that he proceeded with his building subject to such a modification in its character as the terms of the interim interdict necessitated; (3) that pursuer is entitled to recover the extra expense caused by the said change of plan.

This was an action at the instance of Alexander Robertson, merchant, 112 High Street, Perth, against Andrew Taylor Wilson, boot and shoe maker, 110 High Street there. The parties are the owners of coterminous properties in the said High Street, and in the autumn of 1883 the pursuer proposed to make certain alterations on his property, by pulling down and rebuilding some portions of it. On 10th August 1883 the defender brought an action of interdict against the pursuer in the Perth Sheriff Court, in which he prayed the Court to interdict him "from erecting any building betwixt that fore tenement of land, Nos. 106, 108, and 110 High Street, Perth" (belonging to the defender Wilson), "and that back tenement" (belonging to the pursuer Robertson), lying in the south of the said fore tenement, higher than the toofall or building belonging to the pursuer, "which presently stands betwixt the said fore tenement and the said back tenement, the walls of which toofall or building are 9 feet 1 inch in height from the level of the ground, and the ridge of the roof of which toofall or building is 4 feet 9 inches in height from the top of the said walls, or in all 13 feet 10 inches in height from the level of the ground." The Court was also prayed to interdict the pursuer from encroaching on a building belonging to the defender and attached to his said fore tenement. Interim interdict was granted. The pursuer entered appearance in the said action. In his defences he reserved "all claim competent to him in respect of the action adopted by" the defender. On 4th March 1884 the Sheriff-Substitute pronounced an interlocutor recalling the interim interdict, and refusing the prayer for perpetual interdict. On appeal, the Sheriff-Principal, by interlocutor of 2nd April 1884, affirmed the Sheriff-Substitute's judgment.

The pursuer thereupon raised the present action of damages, concluding for £200, in respect of loss which he had sustained through the action of interdict brought against him by the defender. He averred that he had suffered loss to this amount through the building operations being for some time stopped, and also through being compelled, in order to proceed with the building during interim interdict, to alter his plans, thereby occasioning additional expenditure, and causing the building to be finished in a less substantial manner than

was provided for in the original plan, there being less light, an entire upsetting of the internal arrangements, and a disfigurement in the shape of the roof. In addition to this, pursuer had, owing to the delay occasioned by the interdict, to continue in occupation of a shop in George Street, which could have been let at a rent of £60.

The defender averred that the pursuer's operations were in breach of the interim interdict; that the action of interdict was so far justified by the Sheriff-Substitute granting perpetual interdict in so far as concerned the encroachment by pursuer on the defender's building, and finding the pursuer entitled only to modified expenses in that action; that if the pursuer departed from the original plans, he did so of his own free will, and not at the request of or under compulsion from the defender; and further, that the pursuer had not suffered a loss of £60 in respect of his shop as alleged.

As to the alleged threatened encroachment by the pursuer on the defender's building, the pursuer explained that he "only found out, after seeing defender's title and measuring the ground behind defender's tenement, that the north gable of his (pursuer's) shed was apparently built on defender's ground. This was before the action of interdict was served; and when lodging defences to that action, the pursuer stated that he had no intention of interfering with this gable-wall, although it apparently belonged to himself. He also at once gave instructions to his architect to leave the gable alone."

The pursuer pleaded (1) that, having been put to great loss, trouble, and expense through the interim interdict obtained by the defender, he is entitled to obtain damages therefor from the defender, the said interim interdict having been recalled by the Court as unwarranted; and (2) that the amount stated being a reasonable assessment of the damage so suffered, decree ought to pass in his favour as prayed for, with expenses.

The defender pleaded (1) that the pursuer not having been put to loss, trouble, and expense through the interim interdict, is not entitled to obtain damages therefor from the defender; (2) that the defender was justified in applying for interdict, and there having been a fair and reasonable cause of litigation, and the defender not having been guilty of any wrongous litigation, the present action is not maintainable; (3) that the amount claimed is excessive; (4) that the pursuer having completed his premises in the manner they now stand at his own hand and without the sanction of the defender, is not entitled to damages as prayed for; (5) that the interim interdict having been applied for on reasonable grounds and in *bona fide*, he is not liable in damages; and (6) that the pursuer's averments are irrelevant.

A proof was allowed. After hearing the proof, the Sheriff-Substitute issued an interlocutor awarding the pursuer damages to the amount of £50, and finding the defender liable in expenses.

The defender appealed to the Sheriff-Principal, who issued the following interlocutor and note:—

"*Edinburgh, 9th October 1888.*—Having resumed consideration of the cause, reduces the damages payable by the defender to £40 sterling, and decerns therefor; *quoad ultra* adheres to the interlocutor of the Sheriff-Substitute: Finds neither party liable in the expenses of the appeal, and decerns.

(Signed) W. E. GLOAG."

"*Note.*—I have found this a case of considerable difficulty, but agreeing, as I do, with the Sheriff-Substitute, in the general view he has taken of the case, and, to a considerable extent in his opinions as to its details, I think it unnecessary to add much further explanation. I think that this is a case in which the pursuer is entitled to recover such damage as he can show he has suffered on account of the interim interdict against building his saloon of the height originally proposed. The clause on which the defender, Mr. Wilson, founded his action for interdict appears to have been a clause of reservation in the original title, which had been dropped out of the more recent deeds. The clause was a prohibition to build higher than a certain 'toofall' then on the ground. Now, in the petition for interdict, it is averred or implied that the 'toofall' was still on the ground, and so afforded a measure of the servitude *altius non tollendi*. But that, according to the judgments of the Sheriff-Substitute and Sheriff, is not the case; for their judgments proceed mainly on the ground that there is now no 'toofall,' and, therefore, no means whatever of measuring the servitude. Now, the interim interdict was granted on the pursuer, Mr. Wilson's, *ex parte* statement, and in respect not of any misapprehension on his part in point of law, but on a mistaken averment on a matter of fact, about which, especially considering that Mr. Robertson's proposed building was not likely to do him any appreciable harm, he should have made more careful inquiries before raising his action. I am also satisfied that the only question truly in dispute between the parties related to this supposed servitude, and that there was no dispute, or, except for a short time, misunderstanding or difference about the extent of the ground belonging to Mr. Wilson. I think also with the Sheriff-Substitute, that the pursuer's claim is not barred by the fact that he proceeded with his building with such a modification as the interim interdict necessitated. I further agree that £20 is, on the evidence, a fair estimate of the extra expense occasioned by the change of plan. On consideration, however, I am of opinion that the pursuer has not made out his claim for £50, or any part of it, on account of his inability to let to Mr. Fraser the shop which he occupied while the alterations on his premises in the High Street were proceeding. I find no distinct or satisfactory evidence either that the work could have been finished by November, had there been no interdict, or that the modified building could not have been finished by that time. There is, I think, no witness who in distinct terms makes either assertion. The tradesmen's offers have been lost, and it is impossible to say what they contained. In short, the proof on this point is so loose and defective that I am unable to hold that the pursuer has made out this part of his claim, which, it may be observed, was manifestly put on record as an afterthought; on the other hand, the pursuer in his petition avers that he suffered loss because the premises, as altered to avoid the interdict, were in various respects inferior to the premises which he proposed to build, but was prevented from building. My impression is that the pursuer has to a certain extent made out this branch of his claim, and I think that his damage on this head may be not unfairly, although no doubt roughly, put down at £20.

(Intld.) "W. E. G."

Act. J. B. McCash—Alt. M. Stewart.

Notes of American and Colonial Cases.

CONTRACT IN RESTRAINT OF TRADE.—A contract not to engage in the profession of medicine or surgery within certain limits is not void simply because the duration of the restraint is not limited.—*French v. Parker*, Rhode Island Supreme Court, May 17, 1888.

ASSAULT.—*Provocation.*—Insolence from a coloured person to a white policeman is not an excuse for the latter beating the former with a club.—*Burns v. State* (Ga.), 7 S. E. 88.

HUSBAND AND WIFE.—*Necessaries of wife living apart from husband in adultery connived at by him.*—A husband is liable for necessaries furnished to his wife whom he has expelled for adultery committed by his connivance.—*Wilson v. Glossop*, English Ct. of App., Jan. 23, 1888; 37 Alb. L. J. 273.

COMMON CARRIERS.—*Limiting liability for loss by connecting lines.*—A transportation company cannot relieve itself from liability for loss of goods accepted by it for transportation by a stipulation in the bill of lading that in case of loss the railroad shall be responsible in whose actual custody the goods are at the time of such happening, the railroad company being merely its agent.—*Block v. Merchants' Dispatch Transp. Co.* (S. C. Tenn.), Feb. 19, 1888; 37 Alb. L. J. 268.

SLANDER BY COUNSEL.—A statement by counsel for the prevailing party, in his argument, that he would submit the case without argument if the jury knew how the other party and his father and brother, his witnesses, were regarded in the place where they live,—is ground for new trial.—*Perkins v. Burley* (N. H.), 6 N. Eng. 817.

HOMICIDE.—*Evidence.*—On a trial for murder, evidence that the two victims were shot and their bodies sunk in the lake, and one of the bodies was robbed; that defendant had a black boat, and that a person was seen at a distance in a black boat on the morning of the murder, going from where the bodies were found towards defendant's house; that he owned a Winchester rifle, which could not be found; that one of the victims and himself had been subpoenaed to testify before the grand jury the morning of the murder as to a charge against defendant's son, about which he showed great anxiety, and that he displayed agitation upon being arrested and taken to the scene of the murder, and into the presence of the dead bodies at the undertaker's by the sheriff, who maintained a threatening attitude toward him,—is not sufficient to support a verdict of guilty.—*Miller v. Territory* (Wash. T.), 19 Pac. 50.

MARRIAGE SETTLEMENT.—*Creditors.*—A deed made pursuant to an antenuptial settlement is valid against the husband's creditors, where the wife did not know that he was indebted at the time and no fraud was intended.—*Nance v. Nance* (Ala.), 4 So. 699.

LARCENY.—Where defendant shot a hog in a thicket, and covered it with pine tops to conceal it until he could secretly remove it, there was a taking and carrying away sufficient to complete the offence of larceny.—*Frazier v. State* (Ala.), 4 So. 691.

THE JOURNAL OF JURISPRUDENCE.

THE PROGRESS OF THE LAW OF SCOTLAND.

AN ADDRESS DELIVERED AT THE OPENING OF THE SESSION OF
THE SCOTS LAW SOCIETY OF EDINBURGH UNIVERSITY,
5TH NOVEMBER 1888, BY MOIR T. STORMONTH DARLING,
M.P., SOLICITOR-GENERAL FOR SCOTLAND.

I SUPPOSE no period of the world's history has been more fruitful of change than the seventy-three years which have elapsed since the institution of this Society. Its birth was coeval with the battle of Waterloo, and the flintlocks of Wellington's soldiers were not more unlike the Martini-Henry of the modern private than were the manners and customs and whole conditions of existence of 1815 unlike those of 1888. The magnitude of the change is of course mainly due to the conquests of science and to the ready use which has been made of these by the enterprise of a commercial age. Steam, electricity, the penny post, the daily press, have not only revolutionized the habits, but they have profoundly affected the ideas of men. And the law, which, in the case of a free people, is a mirror of their ever-changing wants and notions, has kept pace in a remarkable degree with the new interests, the new capabilities, the new outlets for individual energy, the new conceptions of civic and social life.

Personally, I am not amongst those who regard the past as one long black night, out of which we are slowly emerging into the full blaze of universal suffrage and the electric light. I have never been able to rise to those heights of patronizing commiseration from which some highly enlightened persons are in the habit of surveying their forefathers. Although they lumbered up to London in a stage-coach instead of rushing over the distance in a Pullman car; although very few of them possessed the franchise, and they were content to have newspapers only twice a week; although they dined at absurdly early hours, and were ignorant of the blessings of limited liability companies,—still it is possible that they lived pleasant and useful lives, and were good and honourable citizens. It is true that *we* should have been without

excuse if we had continued to live as they did, and been content with the things which satisfied them. But it is equally true, and it is sometimes forgotten, that changes which were expedient for us would not have been desirable or even possible in their case; and that the reforms in legislation and in manners, on which we plume ourselves most as evidence of our progress and enlightenment, have been rendered possible by physical conditions to which they were strangers. It is to this category that I think we ought to refer not merely the legislation which has been directly caused by the formation of great public undertakings—such as railway companies and the like, but also all that has resulted from a better knowledge of scientific facts, such as the Acts relating to public health, and even those vast political changes which have enlisted so much larger a proportion of the people in the task of self-government.

There has, however, undoubtedly been going on at the same time a gradual development of public opinion in regions unaffected by the progress of science, which has left its impress on the law through the medium both of statute and decision. As an example of this, I may refer to the more humane ideas which now prevail with regard to punishment. We know that for some years after the institution of this Society, it was by no means uncommon to inflict capital sentence for crimes other than murder, such as rape, robbery, forgery, sheep-stealing, and cattle-stealing. In the Notes to Hume's Commentaries, a case is mentioned so late as 1818, in which a lad of seventeen was hanged at Aberdeen for stealing twenty-seven sheep, although it was his first offence. In view of a sentence so abhorrent to our modern notions, it is rather startling to find that this Society, in the same year, decided by a majority of nine out of fourteen that "other crimes than murder should be punishable with death," and that they repeated this finding by a smaller majority in the year 1820. This is a matter on which we may safely congratulate ourselves that we are wiser, or at least less Draconic than our sires. But I rather think that at one time the revulsion of feeling from the extreme severity of the past went too far. It is a curious instance of the fluctuation of public opinion, that some twenty years ago there was a great agitation for the abolition of capital punishment, even in cases of murder, and that now the proposal is never heard of except among a few sentimental doctrinaires. Unhappily, we are constantly reminded that, with all our boasted civilisation, the innate ferocity of human nature—the *vis insani leonis*—is as strong and as terrible as ever. Such crimes as the Phoenix Park murders, or the recent horrors in Whitechapel, would be enough to sweep away all the mawkish suggestions of the extreme sentimentalists like gossamer. But I hope I shall not be thought too bloodthirsty if I say that, in a certain class of cases which are undoubtedly murder and nothing else, there seems to me to be an unfortunate

tendency on the part of some Scottish juries (for I do not think you find the same tendency in England) to shrink from returning the proper verdict, and to take refuge in the alternative of culpable homicide. Where you find a brute in human shape doing his unfortunate wife or paramour to death, with every circumstance of recklessness and ferocity, I do not admire the tenderness of a jury which hesitates to affix the proper name to his crime. It may be that he has begun his attack with no definite object, except the indulgence of his fury; but I should like to see on the part of the jury a little less tenderness for the ruffian in the dock, a little more regard for the safety of other possible victims, and, above all, a more fearless determination to return their verdict according to the evidence.

While it is quite possible, in the case of murderers and law-breakers, to let humanity degenerate into weakness, it is not possible to be too humane towards those who are unfortunate and at the same time law-abiding. Such persons are eminently deserving of all the protection and all the favour which the law can show them. I need hardly remind you that, in this respect, enormous progress has been made since the early days of the Society. The labours of philanthropists like the late Lord Shaftesbury have put an end to the cruelties which used to be practised on helpless women and children in the factory and in the mine. The "climbing boy" was common in the early years of the century; he is unknown now. Little children used to be kept at work for hours amid the din of the factory or in the darkness of the coal pit. Now no child under ten can be employed in a factory or workshop, and no child under twelve can be employed underground. Women were often put to work of a kind and for a period far beyond their strength; now they can only be employed in factories under the strictest regulations as to hours, and they cannot be employed in mines at all. The gradual elevation of the status of women, which is perhaps the surest note of advancing civilisation, has extended far beyond the regulation of their labour. The property of married women has been so far liberated from their husbands' control, that they have positively attained to the proud position of liability to be made bankrupt. There has been a growing tendency on the part of Courts to recognise their claim to the custody of their children in cases of separation and divorce, although I confess I think there is room for still further relaxation of the old presumption in favour of the father. By the recent Guardianship of Infants Act, the mother is for the first time recognised as the legal guardian of her pupil-children after the death of the father, and she is empowered to nominate guardians to act after her death, either alone or jointly with any tutor nominated by him. If it be said that these are advantages conferred only on married women, the answer is that they were the persons on whom the disabilities of the old law

bore most hardly, and unmarried ladies have the consolation of knowing that since 1868 they have shared equally with their married sisters the privilege of acting as instrumentary witnesses, and that they exclusively enjoy those municipal and school board franchises which I hope and believe will ere long ripen into the right of electing members of Parliament.

Another matter in which the law has made enormous advances within the last sixty or seventy years, is with regard to the position and privileges of working men. It is difficult for us now to realize it, but nevertheless it is the fact, that before 1824 combinations among workmen in connection with their trade were illegal. If two workmen combined together to go to their master upon the same day and ask for an increase of wages or a reduction of the hours of labour, they were liable to be treated as criminals. That was put an end to by an Act passed in the unreformed Parliament; but for many years afterwards the societies by which workmen strove to provide for sickness and old age remained unprotected by the law, because these objects, praiseworthy in themselves, were mixed up with others which were supposed to be in restraint of trade. They also laboured down to 1875 under the undoubted grievance that, although the contract between them and their employer was a purely civil one, and if the master broke it he was only liable in civil consequences, still, if the workman broke it, he was liable to be dealt with criminally. All that has now been put right. Trades unions are fully recognised by law. So long as workmen do not attempt by acts of violence or intimidation to coerce their neighbours, they are perfectly free to combine for the purpose of obtaining better terms from their employers. Friendly societies are placed under proper supervision, so that their funds may be made available for the relief of their members. And the relation between employer and employed now stands upon its logical basis as a purely civil contract, for the breach of which no criminal consequences can be incurred by either party, except where the breach is committed maliciously and in the knowledge that its effect will be to endanger human life, or to cause serious injury to person or property. To this I need only add that the extreme rigour of the doctrine of *collaborateur* has been relaxed in favour of the workman, so as to make the employer liable, not only for his own negligence and for the defective state of his works and appliances, but also for the negligence of those who have superintendence entrusted to them, or to whose orders the workman is bound to conform.

There are other regions, unconnected with the interests of any particular class of the community, in which the tendency of the law has all been in the direction of greater freedom from restriction and technicality. It would be tedious to attempt to enumerate these, but I may remind you of one or two instances.

The law of evidence is one of them. Formerly the law, by its

list of disqualifications of witnesses, seemed anxious to create every possible obstacle to the proper ascertainment of the truth. Instead of treating the circumstances connected with particular witnesses as deductions from their credibility, it insisted on regarding these as absolute objections to their admissibility. At its worst, it rejected in civil cases the evidence of women; but, long after the practice in that particular had been relaxed, it continued to reject the testimony of all who had any interest in the cause; of the near relatives, the agents, the domestic servants, the tenants at will of the parties; of those who offered their evidence without having been regularly cited; often, in short, of those who knew most about the matter in hand. By degrees these restrictions were abolished, but it was only, as you know, in the year 1874 that the parties in divorce suits were made competent witnesses. Inasmuch as adultery is of a quasi-criminal nature, this relaxation went far to pave the way for the admissibility of accused persons, which is already the law in some, and will shortly, no doubt, be the law in all criminal proceedings. Whether this change will turn out to be for the advantage of accused persons may well be doubted, for if they do tender themselves as witnesses, they may often break down in cross-examination, and if they do not, it may be difficult for a jury to avoid coming to the conclusion that they are unable to explain the circumstances consistently with innocence. But that is no reason why the change should not be made, if, on the whole, it is likely to operate in favour of the ascertainment of the truth. An innocent man is pretty sure to welcome an opportunity of giving his own explanation of the facts to the jury, and he will be very unfortunate indeed if it does not lead to his acquittal. In the case of a guilty man, on the other hand, it will probably tell against him, and if so, justice is all the more likely to be done. Apart from the question of the admission or rejection of particular witnesses, there has been a growing tendency on the part both of Parliament and the Law Courts to enlarge the sphere of parole evidence. I am far from contending that it is not perfectly reasonable to require certain transactions, like guarantees, cautionary obligations, trusts, and contracts about land, to be reduced to writing, but I think every one will admit that the recent admission of parole, by the Bills of Exchange Act of 1882, to prove any fact relating to a bill or promissory note which is relevant to any question of liability thereon, was a wholesome relaxation of the older and stricter rule.

The escape from technicality has taken place chiefly in the great field of conveyancing. That deeds must always be to a large extent technical is, of course, inevitable, if there is to be anything like security in the rights of which they are the muniments. But they may be technical without being cumbrous, and without there being too many of them; and the great merit of the long series of conveyancing statutes which have been passed within the last forty years is this—that, without destroying the main features of our system

of land tenure, they have enormously reduced the number of deeds to be granted, and shortened and simplified the terms of those which still remain necessary. I do not know whether the fidelity of our great conveyancing reformers to the leading principles of the feudal system is universally regarded as a merit or not. In popular estimation the feudal system does not stand very high, chiefly, perhaps, owing to its rather domineering phraseology. A few years ago it was common for some of those who desired amendments of the law, to describe anything to which they were opposed as "a relic of feudalism," and when they had attached this label to it, they seemed to think that they had clinched the matter, and that all necessity for argument was at an end. The feudal system in its origin was undoubtedly designed for a very different state of society from the present. It was simply a military organization, in which service in the field was the consideration for a homestead and protection in the enjoyment of it. But the system has had the merit of adapting itself wonderfully to the changing conditions of life; and the prevalence in Scotland of its logical outcome—subinfeudation—as compared with the departure in England from strict feudal principles involved in the statute *Quia Emptores*, explains why in the one country a man who wants to build a house becomes, as a rule, the owner of the ground on which it is to be built, while in the other he can rarely obtain anything more than a long lease. As matters now stand, it may safely be said that the relation of superior and vassal means nothing more than the existence of a well-secured interest in land distinct from the ordinary right of ownership. That such an interest should exist is not inconvenient, for it in no way interferes with the full dominion being exercised by the owner, and it permits of the price or consideration being converted, wholly or partially, into an annual payment, instead of being paid as a sum down. So long as the superior had to be resorted to at every transmission of the property in order to confirm the new owner's right, the system led to the unnecessary multiplication of deeds, with all the attendant disadvantages of expense and complexity of title. But now that entry is implied, and writs by progress are abolished, the superior no longer figures as a lion in the path, to be appeased by payments to his attendant jackal, but rather as a good genius, to whom recourse can be had, as in the case of writs of *clare constat*, in order to clear the title of the vassal's heir. I do not, of course, forget that the superior occasionally appears in the less benevolent character of demanding a casualty, and that casualties, from their irregular incidence and uncertain amount, are by no means viewed with general popularity. But it must be kept in view that it is now in the power of every proprietor of land to redeem his casualties, and that in feus granted subsequent to 1874 it is impossible to stipulate for any casualties, except at fixed intervals and of ascertained amounts.

The long process of shortening and simplifying the titles to land has been accompanied by other important changes, the tendency of which has been to remove all unnecessary impediments to the intention of testators and of the parties to a contract receiving full effect. Of these a notable example is to be found in the 38th and 39th clauses of the Conveyancing Act of 1874, by which, while insisting on the essential requisite that a probative deed must be attested by two witnesses, the Legislature has dispensed with the mere "leather and prunella" of naming and designing the writer, specifying the number of pages, and naming and designing the witnesses in the body of the deed, so that, in short, wherever a deed has been subscribed by the granter, and attested by two witnesses, it is to receive effect according to its legal import, in spite of any informality of execution. Again, we have got rid, though only within the last twenty years, of the absurd restriction that no man could will away his lands except in the form of a *de presenti* conveyance, and especially by using the word "dispose"—a state of the law which undoubtedly led to the intention of testators being frequently frustrated. This was a crucial instance of the blind worship of technicality, for I do not suppose that the most obstinate admirer of the old law would now maintain that any injustice or inconvenience arises from leaving the intention of testators of land to be construed on the same principles of common-sense as regulate the construction of wills dealing with moveables. Perhaps the most curious impediment to the testamentary freedom of a proprietor of heritage was the law of Deathbed, which only became a legal antiquity in 1871. Originally devised, no doubt, as a lay defence against clerical importunity, it survived long after clerical importunity had lost those spiritual terrors which alone made it formidable. Instead of leaving the question of facility and circumvention to be investigated as a matter of fact by the ordinary rules of evidence, it established a number of hard and fast presumptions, the effect of which undoubtedly was to deny effect to some perfectly unobjectionable deed, and to let others pass which might very well have been reduced. It had at least the merit of giving rise to some curious speculations, for I find that this Society once debated the question whether attendance at a Dissenting place of worship within the sixty days would have the same effect as going to kirk. I cannot at this moment say what the decision was, but I should think it was very hard on the Dissenting place of worship if it was not thought at least as good for the purpose of proving mental capacity as a race-meeting, for I find that in 1763 a deed was attacked, the granter of which had, after its execution, and shortly before his death, gone to a horse race at Lochwinnoch, where, as the rubric bears, "there was a sort of market, occasioned by the conflux of people, but no legally established market;" and yet this was held to be a "going to kirk or market" in a sense sufficient to elide the presumption, and

to support the deed. In an Act of Sederunt in 1692 this curious tissue of artificial presumptions was described as the "excellent law of Deathbed." Perhaps in its day it may have served some good purpose not clear to our modern eyes, but no one now would be bold enough to desire its resurrection. Side by side with those statutory changes in favour of testamentary freedom, there has, I think, been growing up an increasing anxiety on the part of Courts to give effect to whatever can fairly be inferred to have been the intention of a testator. When a man, by himself or his agent, uses words of art, there is no hardship, but the reverse, in affixing to his words their strict signification; but whenever a testator, especially if he is unlearned, uses language of obscure and doubtful meaning, the one unfailing rule is to endeavour, from the whole context of the will, to arrive at his real intention, and I think it will be generally conceded that no body of men could be more faithful to this rule than the judges who at present administer the law of Scotland.

Time has permitted me to glance at a few only of the departments in which the law has made progress since the institution of this Society. I think we may reasonably congratulate ourselves that this progress has been steady and great. And I confess it seems to me difficult to take even the most cursory view of legislation during the last half-century without coming to the conclusion that Scotland at this moment stands fully abreast of the sister countries in the equity and completeness of her jurisprudence. I know that it is common to say, and that it is easy to draw a thoughtless cheer from a popular audience by saying, that she gets less than her fair share of the attention of Parliament. It is undoubtedly true that purely Scottish Bills have frequently been fixed for odd days and late hours, and that Scotland has suffered, like other parts of the empire, from the clamorous demands of an island where everybody is eloquent and everybody has a grievance. But when, as lawyers, we survey calmly the present state of English and Scottish law, I think it is impossible at this moment to name a single department of legislation in which we are behind our neighbours. People who make this complaint are apt to forget that much of the most important statute law is of general application. But, even taking the subjects on which Scots law requires to be specially dealt with, where is the evidence of comparative neglect? It was only a few years ago, and in a very lame and halting fashion, that Parliament tried to confer on England the advantages of a public prosecutor, which Scotland has enjoyed for centuries. It was only in 1883 that the English law of bankruptcy was put upon something like the same firm and satisfactory footing that has existed in Scotland since 1856. The Public Health Consolidation Act for Scotland was passed eight years before the corresponding English Act. In accomplishing the fusion of law and equity, and

simplifying the pleadings and procedure of the Supreme Courts, the English Judicature Acts only gave to England what Scotland already possessed. The Sheriff Courts of Scotland have for long had a wider jurisdiction than the County Courts of England. I suppose no Scots lawyers would be willing to exchange our own law of husband and wife for a system which still requires a wife to prove cruelty as well as adultery before she can get divorce, and, on the other hand, compels a judge to send a husband to prison, however large an allowance he may be making for his wife, if the husband finds it not conducive to the happiness of either that they should live in the same house. We know that at the present moment there is no change in the English land laws which is more anxiously desired by English lawyers than the institution of something like the Scottish system of registration. National education has received quite as much attention in the one country as in the other; the grievances of our farmers and our workmen have been redressed with an even hand; our mercantile law is in no respect less advanced. For the moment Local Government in England stands a session ahead of us, but that only means that when two men ride on a horse one must sit in front of the other.

It is, indeed, a curious commentary on the charge of legislative inactivity for Scotland, that there is not a single Lord Advocate among those who have sat in Parliament for any length of time, within the last forty years, who has not been able to connect his name with some measure of first-rate importance. The Poor Law Act of Lord Colonsay, the Entail Act of Lord Rutherford, the Bankruptcy Act of Lord Moncreiff, the Universities Act of Lord President Inglis, the Conveyancing Acts of Lord Gordon, the Education Act of Lord Young, the Roads and Bridges Act of Lord Watson, the Entail Act of Mr. Balfour, and the Criminal Procedure Act of the present Lord Justice-Clerk, rise to one's mind the moment these distinguished names are mentioned. I do not suppose that the considerations to which I have called your attention will weigh with those writers and speakers who do not attempt to redd the marches between a national sentiment which is honourable and a national prejudice which is unworthy because it is false. Neither do I desire that Scottish politicians should abate one jot or tittle of their just demands for a full share of Parliamentary attention. All I say is, let us be fair, and do not let us as lawyers, who know what has been done in the past, use language which is only excusable because it is uninformed.

Great as I think our progress has been, there is nothing farther from my mind than to suggest that we have reached a stage at which we may fold our hands, and act as if there were nothing more to be done. In law, as in science, in art, in every field of human enterprise, the intellect is active, and will have its career.

So long as society is in a healthy state, men will continue to justify the description of the Laureate, as—

. . . "Ever reaping something new,
That which they have done but earnest of the things that they shall do."

If I have spoken more of the past than of the future, it is not that I am insensible of the claims and duties which the future will bring. When I first accepted your flattering invitation, I had it in my mind to discuss some of those subjects which are likely soon to engage the attention of lawyers. But I was then in a position of "greater freedom and less responsibility." Situated as I now am, I think you will agree that it would not have been becoming if I had expressed opinions of my own upon matters which are now, or may shortly be, under the consideration of the Government. But you, gentlemen, are under no such embargo. With life before you, the questions arousing your keenest interest will be those which belong to the coming time. You will bring to their discussion minds free, perhaps, from some of the prejudices and prepossessions of older men. May I not also express the hope that you will approach them in a spirit of reverence for the noble fabric of Scottish Jurisprudence, and with a determination to maintain its cardinal principles of liberty and order?

STAND UP FOR YOUR RIGHTS!¹

"Wer sich zum Wurm macht, kann nachher nicht klagen, wenn er mit Füßen getreten wird."
KANT.

THE existence of law and of individual rights presupposes a conflict. Not a right has been acquired, not a law has been established, but by conquest. If we survey the history of law in its entirety, we see before us the drama of a nation's struggles and strivings for the security of its life, economic, social, and intellectual. We see, also, that every individual who has to assert his rights, takes his part in that national labour, and thus contributes to make good in reality what had previously existed only as aim,—to realize the idea of law.

It is, of course, quite true that, in the case of thousands, life passes without let or hindrance along the paths which law has beaten. To the minds of such men law suggests no conflict; they regard it as the state of peace and repose. The truth is that they

¹ In 1872 von Ihering of Vienna, now of Göttingen, published a pamphlet, entitled *Der Kampf um's Recht*, which in 1880 reached its sixth edition, and which in 1874 had been translated into the Hungarian, Russian, Modern Greek, Dutch, Roumanian, Servian, French, Italian, Danish, Polish, Bohemian, Croatian, and Swedish languages. It has also been translated into Spanish, and in America into English. From this fact its popularity may be inferred; and as its aim is practical, and its applicability by no means confined to the country of its origin, a short abstract of its contents may not prove wholly without interest.

are enjoying the fruits of other men's labours, for of peace and repose history knows nothing save in so far as they are results of war and labour.

No one disputes the fact that, in the maintenance and administration of the law, the State is in constant conflict with the lawless and the disobedient. But regarding the origin of law there is not the same unanimity. According to the theory of legal evolution associated with the names of Savigny and Puchta, the formation of law was painless, gradual, and secret. It was the force of truth, which, working in silence, brought conviction to the minds of men by slow degrees and without effort. And to this conviction they gave expression in their action. Now it is quite true that this description of legal development holds true within certain limitations. Given the law, it is undoubtedly elaborated in detail by the requirements of human intercourse, and by the deductions of legal science. But the power possessed by these factors is limited. It can work only upon a given material; it is operative only within existing grooves. It cannot break away from these constraints, and carve out a course for itself. If a new departure is necessary, the State must step in, and apply its forces in the given direction.

The influence of the change thus operated may be confined to an improvement in the machinery of law. But very often the interests of whole classes of the community are so bound up with the law as it stands, that a conflict arises, the issue of which depends not on the importance of the principles involved, but on the preponderance of the power of one of the opposing forces. The result is not infrequently the same as in the parallelogram of forces, i.e. a deviation from the original line into the diagonal. It is thus the force of obstruction possessed by the interests concerned in the subsistence of a right or rule, that maintains it when public opinion has pronounced against it. All that is greatest in the chronicle of law and of right—the abolition of slavery and serfdom, liberty of conscience, freedom in trading—has been gained after the bitterest conflict, lasting sometimes for centuries. And the path which has thus been travelled is marked often by human blood, and always by violated rights, for "law is the Saturn who devours his own children."¹

Savigny's theory is thus not only theoretically unsound, but it involves a practical consequence which is, to say the least of it, disastrous. It teaches that the best thing for a man to do is to stand with his hands in his pockets, and await in faith for what shall gradually emerge into the light of day from that primary source of law and rights—national conviction. Hence arose the dislike shown by Savigny and his followers to the interference of legislation, as well as Puchta's entire misapprehension as to the true meaning of custom.

¹ Von Ihering, *Geist d. Röm. Rechts*, ii. 1, § 23.

This theory of law was a tribute to the times. The historical might be called the romantic school. But now we know that in the early days of humanity, society was no garden of the virtues in which law sprang up, and flourished from conviction alone. Law was born, as is man, in labour and travail, and it is this which forms the bond of union between a people and its law.

The conflict regarding a man's right is brought about by violating or withholding it; and the question for the party entitled to the right is, Shall I assert it, or shall I depart from it? Shall I sacrifice my right to my peace, or my peace to my right? The answer to this question does not depend upon any mere balancing of profit and loss, for we daily see cases in which the result to be gained is infinitely less than the labour, annoyance, and cost involved in gaining it. People say that a case of this sort is fought out of pure love of fighting, from litigiousity, or from desire to injure the other party. But leave ordinary litigants out of view, and suppose, that of two nations, the one seizes possession of a square mile of worthless land belonging to the other. The question is, Shall the injured nation declare war? Every one knows that a nation which quietly submits to such a violation of its rights has signed its own death-warrant. But if a nation must declare war about a square mile, must not the same rule apply to a peasant whose dispute is only about a few inches? The nation does not fight for the ground, but for its honour and independence; and where the cost of a case is out of all proportion to the value of success, the aim of the litigant is not to obtain an object of little value, but to assert his personality, and the feeling of his rights as a person. The aim is thus ideal: it is not the sober money-interest, it is the moral pain which springs from a violation of his rights that spurs him on to contest the case. The case is no longer a mere question of interest,—it is a question of character, and to withstand a violation of his right is a duty,—a duty not only *towards himself, but towards the community*.¹

It is a duty towards himself.—In the impulse of self-preservation every animated creature gives expression to the law of its life. But man is not a mere animal; he is a moral being, and, as such, he is concerned not only with the physical but with the moral side of existence. It is law—it is the possession of rights—that assures to him his moral existence; that, in such institutions as marriage and property, makes such an existence possible; and accordingly to assert his rights is a moral duty, to surrender them is moral suicide. But it is not every trespass upon a man's rights that gives occasion to this duty. The *bona fide* possessor of an article belonging to me does not deny that I have rights of property; all he does is to assert just such rights on his own behalf. But when the thief appropriates what is mine, he places

¹ Comp. J. H. Stirling's *Lectures on the Philosophy of Law*, 1873, pp. 28, 29.

himself outside the sphere of rights altogether,—he denies that I have any right of property in what is mine, and he thus refuses to recognise an essential condition to my existence as a person. In the latter case the question of property becomes a question of character; and so long as a man is convinced that his right has been consciously violated, that his adversary did him wrong knowingly and wilfully, he will decline to measure the worth of his contention by any standard of interest, value, or convenience.

But the objection will be urged that the ordinary man knows nothing about the right of property as a moral condition of the person. It is true he may not know it, but most certainly he feels it. A man does not require an accurate knowledge of his lungs, etc., to teach him the practical meaning of feeling ill. The moral pain occasioned by the intentional violation of a man's rights operates in precisely the same way. Its intensity differs, as the persons whom it affects differ. A soldier will be most jealous of his honour, a peasant of his property. The former knows that his position requires that he should be the incarnation of bravery. He could not suffer the imputation of cowardice and remain a soldier. The peasant's calling demands of him not courage but labour. His property is but the outward and visible sign of his past exertions.

Thus we see that it is not only the individual peculiarities of temperament and character which determine the intensity of this feeling, but an element which has its origin in profession, occupation, and position. The peasant, for example, feels that just this particular institution is indispensable if the aims with which his occupation furnishes him are to be carried out. And what is true of the individual is true of a whole people. How strongly a nation feels when a particular right or class of rights have been violated—how much it values this right or class of rights—is clearly indicated by its criminal law. Thus a theocracy makes blasphemy and idolatry capital crimes, while it regards the removal of boundaries as a simple offence. An agricultural State, on the other hand, visits the blasphemer with a light penalty, while in the latter case it lets fall the utmost weight of punishment. The notion that a question regarding a right of property can have nothing to do with the personality of the litigants, owes its origin to complete forgetfulness of the moral element in acquisition. Work—work that is intellectual as well as physical—is the historical source and the ethical justification of property. In the labourer we recognise the right to enjoy the fruit of his labours during his life, and also to dispose of it after his death. But it is only by a permanent connection with work that property can keep fresh and healthy. The further the stream departs from its source, the more turbid it becomes, until it is lost in the mud of swindling and speculation, and here, of course, there can be no question of a feeling of moral duty.

The philosophy of life which preaches the abnegation of rights is simply a policy of cowardice. The coward runs and saves his life at the price of his honour. But if every one acted as he acts, all were lost—the community and the coward himself. And the case is just the same with the man who yields his rights. To adopt his maxim as a universal rule of conduct, would be to destroy law and right altogether. No doubt it seems to us a small matter that a man declines to stand up for his rights; and the reason is, that we are members of a State in which the graver violations of a man's rights are not left to him to combat. He has the police and the criminal law to secure him in the enjoyment of these rights. In order, then, to see how the matter really stands, we must take a case of violated rights where no such securities exist.¹

It is a duty towards the community.—If a man declines to assert his rights, who suffers but himself? The whole community suffers. A man's right is just the authority which the State gives him to champion the law in his own interest; and, accordingly, when he asserts his right, he defends the law within the narrow limits which it occupies as coterminous with his right. It is a question not merely of maintaining the law in its majesty and authority, but of assuring to the ordinary life of the citizen order and security. If the larger portion of society declined to take legal proceedings against dishonest traders, debtors, servants, etc., the life of those who stood upon their legal rights would be a perfect martyrdom; but the responsibility for such a state of things would rest not so much with the lawless as with those whose indolence and cowardice gave opportunity to lawlessness.

Thus, in asserting my rights, I am not asserting myself only,—my individual claims, my personal interests. I am taking my part—it may be unconsciously—in a national task. I am contributing to make good in reality what has previously existed only as aim—to realize the idea of law.

And, accordingly, when a man's right is violated, it is not the individual right only, it is the law, that suffers; and this solidarity of law and right remains, although all that the individual has in view is his own narrow interest. Hate and thirst for vengeance brought Shylock before the court to claim his pound of flesh. Still the words which the poet assigns to him are as true in his mouth as in another's:—

“The pound of flesh, which I demand of him,
Is dearly bought; 'tis mine, and I will have it.
If you deny me, fie upon your law!
There is no force in the decrees of Venice.”

“I crave the law.”
“I stay here on my bond.”
“I crave the law.”

¹ *Vide supra*, p. 627, s.f.

No philosophical jurist could have indicated with greater accuracy the true relation of law to rights, and the meaning of the conflict for rights. It is no longer the claim of Shylock that is in question—it is the law of Venice; for the right of the Jew and the law of Venice are one and the same—they stand and fall together.

In asserting his right the citizen does battle for the law, he fulfils his duty at once to himself and to the State; and the State finds the surest guarantee of its own subsistence in the healthy sense of their rights on the part of its citizens.

We do not propose to offer any criticism of this theory; but we desire, in conclusion, to make two observations. In the first place, we should have thought it unnecessary, had there not existed misconception on the matter, to say that von Ihering gives no encouragement to those who wish to go to law about trifles. His view is that a man should invariably assert his right, when violation of that right involves a disregard of what is due to the man as person,—when the question of interest is transformed into a question of character.

In the second place, it seems to us that von Ihering's view of the solidarity of law and individual right, involving as it does the proposition that in abnegating my right, I am betraying the cause of the law, is worthy of remark at a time when the tendency to disregard the law is no less marked than the tendency to settle cases.

P. J. H. G.

DE MINIMIS.

The clergy gather pence, halfpence,
The doctors scruples, grains dispense,
But lawyers hold it an offence
With trifles small one's soul to vex :
De minimis non curat lex.

But if there is a hair to split,
And handsome fees for doing it,
There's not a lawyer wants the wit—
Especially to take the cheques :
De minimis non curat lex.

You wish a contract or a will :
Five reams of foolscap they will fill,
While you must pay their verbose skill—
When lawyers little things annex :
De minimis non curat lex.

As men beat out a grain of gold,
 To cover areas untold,
 Or make it miles of wire unrolled,
 So law treats points—the merest specks :
 De minimis non curat lex.

If youth the lawyer trade will choose,
 Upon the woolsack he has views—
 A puisne judgeship he'd refuse :
 Ambition big rewards expects :
 De minimis non curat lex.

And after years of idleness—
 It may be forty more or less—
 He's still a junior: who would guess
 The law could so her children vex ?
 De minimis non curat lex.

And if he finds it hard to live,
 However poor, he will contrive
 To fascinate and then to wive
 A millionaire of female sex :
 De minimis non curat lex.

If vested interests are small,
 No heed is paid to them at all ;
 Unless they raise their voice and bawl,
 Like those of beer and XXX :
 De minimis non curat lex.

Thus everything now goes by size—
 Political majorities,
 The sheep and pigs that take a prize—
 The reason need no man perplex :
 De minimis non curat lex.

Correspondence.

A PETITION FOR CESSIO.

(*To the Editor of the Journal of Jurisprudence.*)

SIR,—A petition for cessio was recently presented under the circumstances detailed below. The Sheriff-Clerk, however, stated that it was incompetent, and referred to an interlocutor of Sheriff Crichton as an authority.

It became unnecessary to press the point ; but as the question

is of some practical importance, I beg to bring the facts under your notice.

A creditor obtained a decree for over £8, 6s. 8d., and gave a charge. The charge expired without payment, and the debtor was at the time undoubtedly insolvent. He was thus undeniably notour bankrupt, in terms of section 6 of the 1880 Act. A few days after the expiry of the charge he made a payment to account, which reduced the debt to less than £8, 6s. 8d. The insolvency, however, still continued, and the creditor's agent, conceiving that the debtor remained notour bankrupt until the insolvency ceased, in terms of section 9 of the 1856 Act presented the petition.

It seems perfectly plain that any other creditor could have presented such a petition, founding upon the creditor's diligence, and without either knowing or caring whether any payment had since been made to account, so long as he was satisfied that the debtor remained insolvent.—Yours obediently, **LAW AGENT.**

EDINBURGH, 7th November 1888.

THE RIGHTS AND WRONGS OF THE NOTARY PUBLIC.

(To the Editor of the Journal of Jurisprudence.)

SIR,—It would indeed be interesting, if it were possible, to obtain a correct analysis of the respective qualifications of the average Notary and of the average "Law Agent." That, however, cannot be got; but a little self-examination by one of these meddling "Law Agents," with perhaps an occasional reference to the Law List, for the purpose of obtaining a more extensive knowledge of the numbers of Notaries and their respective practices and positions when compared with the numbers and practices and positions of "Law Agents," should give him a pretty accurate idea of the position of matters in this respect, and of the respective values placed by the public upon himself and his brethren, on the one hand, and upon those intruding, interloping Notaries, on the other. As we have seen, there is "practically but one kind of business, and it the least remunerative—appearances in the Sheriff Court—from which Notaries are excluded." Why the exclusion should be allowed to exist for another day is a problem without any practical or reasonable solution. All over the country there are to be found solicitors whose qualification and right to practise rest solely upon their commissions as Notaries Public and attorney licences, with extensive and excellent practices, and alongside of them others whose qualification is that of the "Law Agent," struggling to make ends meet. Nor are the practices of these Notaries confined to professionally legal work. According to the Scottish Law List for 1888, of the 109 Notaries in active prac-

tice outside of Edinburgh and Glasgow, there are no less than sixty-eight who hold public or quasi-public appointments of one kind or another, and many a Notary holds, not one, but several of these. The appointments referred to are those of Town Clerk, Clerk to Police Commissioners, Burgh Chamberlain, Burgh Treasurer, Collector of Burgh Rates, Burgh Auditor, Clerk to Heritors, Clerk and Treasurer to School Board, Clerk and Treasurer to Public Trusts, Registrar for Parish, Clerk and Treasurer to Parochial Board. Sheriff-Clerk, Clerk to Justices of the Peace, Clerk of Supply, Commissioner for taking Oaths for Foreign Courts, Clerk to Road Trustees, Collector of Road Assessments, Inspector of Poor, Clerk to Income-Tax Commissioners, Distributor of Stamps, Collector of Taxes, Assessor of Property and Income Tax, Procurator-Fiscal, Clerk to Fishery Board, Bank Agent, Actuary to National Security Savings Bank, Clerk to Harbour Commissioners, Collector and Treasurer County Rates, Clerk and Treasurer to Lunacy Board, and many others. Indeed, the proportion of these public and quasi-public appointments that is held by Notaries far exceeds the proportion that is held by "Law Agents." This, of itself, throws a searching and damaging light upon the position taken up by certain "Law Agents" against the Notaries, and the bitter, prejudiced, and ill-considered statements which they deem themselves at liberty to make against a branch of the profession which, taken on the whole, is every bit as honourable, and as much entitled to confidence and support for sterling worth, ability, and standing, as their own. In those cases, and they are innumerable, where the Notary has succeeded in building up a much more extensive and lucrative practice than his brother the "Law Agent," the reason of his having been able to do so may, in nearly every case, be set down to the fact that the Notary, irrespective of the illusory merits alleged to be attached to a degree, or the so-called superior qualification of the "Law Agent," is the better and sounder and more preferable lawyer of the two, and because the principle of free selection and free play—to which, in certain cases, certain "Law Agents" would allow full swing, but not in this one—is here found luxuriating in a highly developed state. Why should it be otherwise? If a man has energy, ability, industry, prudence, and foresight, he may win his way and come to the front in defiance of cold, malicious, and interested obstruction. If he has not got the ability to do this, he must or should not complain of those who have. *E converso*, the same rule holds good as regards the Notary, for if he has not got the necessary ability or ballast, he must go to the wall and yield to those who have. That is as it should be. In truth, to secure free selection and free play, all unnecessary bars and barriers, and fanciful, artificial, useless distinctions, should be abolished, and honest worth and ability, whoever may be their

possessor, declared to be the passports to success in the legal profession. The line of demarcation which presently exists between the "Law Agent" and the Notary Public branches of the profession, is utterly inconsistent with, and antagonistic to, the present day ideas of freedom of contract, selection, and action. "If the lawyer be only a Notary, he can protest a bill, but he cannot follow out the proceedings in Court on his own protest;" and, on the other hand, if he be only a "Law Agent" and not a Notary, "though he cannot protest a bill for £5" (or even for 5d.!), "he can conduct the proceedings in Court for the recovery of any bill, no matter how large the amount" (Scot. Law Rev., 1887, p. 79). Keeping in view the fact that both the "Law Agent" and the Notary Public are duly qualified practitioners, can it reasonably be said that such a state of things is to "the advantage and convenience of the public"? (See Lord Gillies in *Gray*, 3 D. 813.) Again, take the case of two rival solicitors in a country town, one of whom is a Notary, and the other a "Law Agent." A dispute arises between a client of each of them, which ultimately finds its way into Court. Both agents are intimately acquainted with the whole details of the case, and the clients naturally wish to continue their respective services. Here the "Law Agent" may act for his client in Court, but the Notary is generally debarred from doing so, however great may be the client's wish that he should so act. The result is that the Notary has to employ another "Law Agent" to act for his client, and that in a matter which he is perfectly competent to conduct himself, but is prevented from doing so by a useless and vexatious restriction. "Even if the *Law Agent* thus chosen is known to the client to be a man of first-class ability and position at the Bar, the client may doubt whether his superiority will balance the *Notary's* ability plus his zeal, plus also, perhaps, his personal friendship; for the *Notary* is often the friend as well as the legal adviser of the client. These points apart, the client may not feel so comfortable in trusting his case to a stranger, who hears of it for the first time perhaps a week, perhaps a day, before debating it" (Scot. Law Rev., 1888, p. 44, *slightly altered*). Then, again, such a course of procedure always entails additional expense on the Notary's client, through his being placed under the necessity of employing two agents where one would, but for certain unnecessary barriers, have been perfectly able and sufficient for the work. Will any "Law Agent" honestly say that this division of labour and these restrictions and monopolies are for the benefit of either the client or the profession at large? It is intolerable for a legal practitioner to be thus hemmed in by the caprices of monopoly-loving demagogues. In no other profession but that of the law is such a state of matters tolerated. In the medical profession the whole field is thrown open to its members, irrespective of the value of the degrees under which they respectively exercise their right to practise. There is really no good

reason why those who practise the law should not be placed on exactly the same footing, and that irrespective of the question whether the lawyer is a W.S., S.S.C., S.L., L.A., or N.P. "A learned profession should not be a trades union, divided into branches, each with its rights and privileges, and the manner of remuneration. Let the initial examination be as strict as you please, but, once admitted, I see no reason why the lawyer who wishes it should not be at liberty freely to pass from one branch to another, and offer his services to the public in any capacity in which they may be pleased to employ him" (Sheriff Guthrie Smith's Address to Aberdeen Juridical Society; April 1885).

If the "Law Agent" has such a good claim, not only to exercise his present rights of practice, but also to enter the field presently sacred to the Faculty of Advocates, why should the Notary Public not be allowed full and free entry into the field of Court practice presently occupied by the "Law Agent"? There is indeed much more reason for the latter proposal receiving effect than there is for the former. As we have seen, the existence of the notarial branch of the profession, with its somewhat restricted rights of practice, distinct and separate from that of the "Law Agent," is a source of much feeling and soreness between the two branches that should not be allowed to exist, and such a state of matters is inconsistent with the present day ideas of freedom of choice and action. It not only hampers the Notary, but it hampers the client, and is a source of great inconvenience, discontent, and unnecessary expense. There should be no necessity for a client to fluctuate between two different agents—one a Notary and the other a Law Agent—simply through the existence of certain old world but useless, corroding, and arbitrary distinctions. Both branches of practitioners—more especially the notarial branch—are unnecessarily trammelled and burdened by the existence of such artificial barriers, and the sooner they are destroyed the better it will be for all parties concerned, and particularly for the legal profession at large. The existence of so many different branches of legal practitioners is not conducive to the advantage of any of them, and is inconsistent with the genius of our law. It thwarts many well-conceived schemes for the advancement of professional interests and the more extensive education of the members of the profession. To secure the erection of a sound and substantial legal monument, it is a primary condition that the foundation from which it is to spring shall be a secure one. That cannot be where there are so many conflicting interests which are allowed to remain unsettled, and where one branch is continually trying to undermine another. A legal structure or institution built on such a foundation would be in continual danger from the constant mining and countermining that would be sure to go on. Before the new era is entered upon, all these conflicting interests must be brought into harmony; and to do so, a sweeping and radical

reform is necessary. So far as the question lies between the Notaries and the "Law Agents," the only true and equitable step to attain this end seems to be "the simple abolition of all distinction between the Law Agent and Notary Public. As already stated, the business offered to both is the same, so let the status and qualification be the same" (Scot. Law Rev., 1887, p. 79). Such a step would in part restore to the Notaries their ancient rights and privileges. Once they may be said to have monopolized the whole legal business of the country. "Consider," says Mr. Cosmo Innes, in his Lectures on Scotch Legal Antiquities (page 238), "the amount of business arising from the proper jurisdiction of the Ecclesiastical Courts. The Bishop's Official was the only judge in the matter of *status*—legitimacy, bastardy, divorce. He was kind enough to take charge of the affairs of widows, orphans, and all *personæ miserabilis*,—all questions of slander, all disputes between churchmen, the whole management of Notaries Public, questions arising upon covenant where the covenant was sanctioned by an oath (and what covenant of old wanted that sanction?)—the large class of business connected with wills, testaments, probates, executry,—in a word, of all moveable succession, and perhaps of succession in heritage, for there was a time when Scotch heritage could be left by will. In addition to all these, you must take into account the business brought into their Courts by consent of parties, and add to that all the influence of all the Notaries, the largest class of 'men of business,' as we call them, and who were all churchmen or dependents of churchmen, and so preferring the Ecclesiastical Courts. I say, when you consider all this, you need not be surprised that the business in the Officials' Courts of Glasgow, St. Andrews, Edinburgh, was larger and of more importance than the business transacted in all the Sheriff Courts, where there were, you know, no lawyers, and greater also than the King's Council or the Judicial Committee of Parliament, with its occasional sittings, could ever have transacted."

This proposed abolition of distinction between the Notary and the "Law Agent," *ipso facto*, implies that the Notary Public shall be entitled to exercise all the rights and privileges presently exercised by the "Law Agent;" and, on the other hand, that the Law Agent shall be entitled to exercise all the rights and privileges of the Notary Public. There must be no restrictions or qualifications. The reform, to be successful, and to remove all cause of discontent, must be thorough and sweeping, and at once place both branches on the same platform, with equal rights and privileges. There is an excellent precedent for such a step being taken in the 24th section of the Law Agents Act of 1873, which, as already pointed out, authorized certain Notaries Public to be admitted Law Agents; and no sufficient reason has yet been advanced against the extension of the principle, so that it will embrace all Notaries. The adoption of this precedent would not only put an end to the

Notary question—which has already created a great deal of unnecessary feeling—at a single stroke, but it would do much more real good than the tinkering of Acts of Parliament and Sederunt that has been proposed. Such a step would simply be giving a *quid* for a *quo*, as the 18th section of the Law Agents Act provides for the admission by the Court of any “Law Agent” a Notary Public simply on his paying the stamp duty for the time exigible by law from a Notary Public on admission. Why the converse should not hold good it is difficult to see, especially when it is the case, to make quotations, that there is “practically but one kind of business, and it the least remunerative—appearances in the Sheriff Court—from which Notaries are excluded,” and it is now “impossible for any one who does not possess legal knowledge equal to that of an inrant to the Writers to the Signet body, to be admitted a Notary.” In such circumstances, why should the Notary’s sphere of action not be slightly extended, so as to give him an undoubted right to appear in Court, and to perform all, or nearly all, the business his clients may have for him? Everything indeed points to the great advisability of such an extension being made, for if he is qualified in the one sense, as he certainly is, surely he is qualified in the other. No doubt many Notaries would not take advantage of such a provision or accruing right, just as many did not take advantage of the 24th section of the Act of 1873, under which they might have been admitted full-fledged “Law Agents.” As regards those who did take advantage of it, if any should prove unfit, the law of natural selection and choice would very soon exclude them from Court practice as effectually as they are excluded at the present moment. To put the case very strongly against the Notary—any inconvenience to which “judges might be put in the meantime by the incompetence or inexperience of Notary pleaders would be no greater than they occasionally suffer at the hands of young *Law Agents*” (Scot. Law Rev., 1888, p. 43, *slightly altered*).

In considering this phase of the question, it should be kept in view that a great many “Law Agents” are absolute failures when they don the forensic toga, and appear as Sheriff Court pleaders. “Indeed, we have Law Agents who, while excellent lawyers, shrink from all forms of Court work, either from an overpowering sense of the responsibility, or from constitutional timidity. Fusion or no fusion, the talent of the forum will assert itself, and will attract the work which its possessor can perform better than others” (Scot. Law Rev., 1888, p. 44). Doubtless we have both advocates and Notaries in the same position. But then it may be pointed out that some of the ablest and most distinguished pleaders in the Sheriff Courts are men whose original qualification was a notarial one, and who were admitted “Law Agents” under the authority contained in the Act of 1873. What they have done surely others can do. Freedom of action is not antagonistic to

specialism, but decidedly in favour of it. Arbitrary and unnecessary lines of demarcation, founded on the principle of monopoly and exclusion, are, however, destructive of and most injurious to the best interests of the profession. Indeed, at the present time, large numbers of Notaries have practically, through partnerships with "Law Agents," all the advantages that the extension of their sphere of action above suggested could possibly confer upon them; and as regards the others, they acquire these advantages indirectly by arrangements with the "Law Agents" whom they employ to conduct litigations in which their clients may be engaged. "Law Agents" who are not Notaries obtain the latter's services in the same way. Such cases are of daily occurrence, so that the real effect of the suggested alteration of the law in this respect, if carried out, would confer no material benefit on the Notary, but would certainly place the Agents in a much sounder and more satisfactory position than they now occupy.

As the Committee of Judges, consisting of Lord Shand, Lord M'Laren, and Lord Trayner, have reported that "the examination of Notaries is no longer open to the objections stated by the Incorporated Society of Law Agents, but has been put on a satisfactory and permanent footing," it is as unnecessary to inquire into the qualifications of particular Notaries or of Notaries admitted during a particular decade or before the change in the system of examination took place, as it would have been both unnecessary and insulting to inquire into the qualifications of those "Law Agents" who were admitted prior to the Law Agents Act of 1873 coming into operation, when the right to practise as a "Law Agent" could be acquired at the price of a good dinner to the examiners of the Society into which the applicant sought admission. The men are admitted, and, by being admitted, have acquired authority to exercise certain rights and privileges; and, to whatever class they belong, it is too late now to raise questions as to their status and qualifications.

It is no doubt the case that there are both Notaries and "Law Agents" whose qualifications are not what they should be; but that is no reason why freedom of action should not exist or why artificial rules and useless monopolies should not be abolished. Were such a fact to be taken into account, then the "fusion" question might at once be discarded and dropped out of sight. We live in a liberal and progressive age, which does not deal very tenderly with the principle of monopoly and exclusion where it is found to exist to the public disadvantage, as it undoubtedly does in the present case. The profession of law is one that loudly demands freedom for its authorized practitioners, and the sooner this is recognised the better it will be for all branches of it. When these monopolies are broken down, and the various branches and grades of the "Law Agent" branch of the profession are placed on an equal footing, then and then only can we expect really

desirable measures to be carried out to a satisfactory issue. So long as Writers to the Signet, "Law Agents" outside that body, and Notaries Public have different and conflicting interests to maintain and defend, it is hopeless to expect that harmony and mutual co-operation and support to exist which are so desirable between kindred associations having similar objects in view. This has already been admitted. "A good many people here think the Incorporated Law Society . . . a brilliant idea, if it could be made to embrace the superfluously numerous branches of the profession in Scotland. But as long as we have one Faculty of Advocates in Edinburgh, and another in Aberdeen, a Society of Writers to the Signet, a Society of S.S.C.'s, and several other corporations or grades of lawyers, it is considered out of the question to expect reform, since there can be none without concerted action, and no concerted action unless by the awkward, roundabout method of conferences" (Notes from Edinburgh, Scot. Law Rev., 1885, p. 107). In this direction unanimity cannot be attained, or is almost impossible to be attained, inasmuch as each one of these various corporations or grades has just as much and just as little right as any other one of them to claim the honour of leadership or power of ruling. The truth is, in fine, that all these bodies have the conditions requisite to constitute a really powerful and satisfactory combination, but that each in itself has only a legal existence practically corresponding to nothing material. It may safely be added that there can be no mutual co-operation and support so long as the "Law Agents," or rather a certain section of them, continue their endeavours to undermine the position held by the Notaries Public, and that, as was pointed out by Lord Craighill in the recent case of *Milne v. Leslie* (15 R. 468), not for the public interest but for their own. Again and again has that position been assailed, and as often has defeat fallen on the heads of the assailants. The Notaries have come out of each action stronger than when they went into it. Their status and their rights are firmly established, and the "Law Agents" referred to need never expect them to yield a single inch of the ground they have acquired. Hitherto the established and well recognised principle has been that, when questions concerning the amalgamation and consolidation of the various branches of the profession were in issue, privilege and monopoly should yield. That principle was expressly recognised and given effect to when the Law Agents Act of 1873 was passed, and nothing has since occurred which affords the shadow of a reason why it should now be discarded. Can it be truly or consistently said that the Notaries who were admitted "Law Agents" under the 24th section of the Act of 1873 are better or sounder lawyers than the Notaries since admitted? If Notaries were fit and competent persons to be admitted "Law Agents" then, they are undoubtedly the more so now, when their standard of education is admittedly higher, and

indeed on a level with that of the "Law Agents" themselves. To hold otherwise would be to cast a slight upon the Society of Writers to the Signet, which is the principal body of legal practitioners in Scotland, and holds the highest rank in the profession. That Society has always required a very high standard of qualification from its members before admission, and it must be remembered that the Notaries Public have now to attain that standard before receiving their commissions. This fact indeed gives additional force to the Notaries' claim for freedom of action in all professional work wherein their clients may require their services. It is far from the interests of the client, and simply in the personal interests of the "Law Agent," that such exclusion and restriction are allowed to exist. In their efforts to attain equality with the Faculty of Advocates, and to make effectual their proposals for the fusion of the various branches and grades of the legal profession, the "Law Agents" might, greatly to their advantage, exhibit a little less "nearness" as regards their own privileges than they do at present. By doing so they would be giving practical proof that their fusion scheme was not based upon self-interest, but upon public policy. The Notaries of Scotland have just as good a right to participate in any benefits that fusion would confer upon the profession and the public as the "Law Agents" have. Their claims hitherto have been treated with too much presumptuous triviality. It is strange, nay it is distressingly absurd, that a body of legal practitioners should exist whose right it is to practise and advise in all the most important legal matters, and that they should nevertheless be excluded from a province of practice of secondary importance, for which they are, taken as a whole, undoubtedly competent. A more glaring instance of inconsistency and injustice it would be difficult to find. In short, as we have seen, such a state of matters not only leads to inconvenience, but it is a source of positive wrong. It entails in many cases the necessity and consequent expense of double agency. And in every such case it may safely be said to thwart the wishes of the Notary's client. The only person who actually derives any benefit or advantage from it is the "Law Agent," and he does so in the very teeth of his own pleas for fusion and freedom of action, selection, and contract.

" Strange that such difference should be
"Twixt tweedledum and tweedledee! "

It cannot be pleaded that the Notaries are incompetent to conduct Court work. They have proved themselves to be competent, and Lord Young expressly said they were perfectly qualified, in a recent case (*Milne v. Leslie*, 15 R. 466). His opinion is indeed entitled to great weight in the present controversy, for he it was who framed the Law Agents Act of 1873, and carried the measure through Parliament. Had his Lordship not then been satisfied of the eligibility of Notaries to be admitted

"Law Agents," it may safely be said that the Act of 1873 would not have contained a clause authorizing their enrolment as such. And if their claims to be enrolled "Law Agents" were good fifteen years ago, they are better and stronger now, for there cannot be the shadow of a doubt that the position of the Notary Public for ability and learning at present stands on a higher level than it did then. In the exercise of common honesty, and in the interests of public policy, the shackles should forthwith be struck from his wrists.

There are upwards of 200 Notaries in active practice in Scotland, and in making these suggestions it is not averred that every one of them has attained that standard of efficiency that is desirable. But it is an undoubted fact that the vast majority of them possess the necessary qualifications to enable them to fall in alongside of the "Law Agents," and that the proportion of them who fall short of being what they should be is not greater than the proportion of "Law Agents" who are in the same unfortunate predicament.

"Faith, even as a grain of mustard seed, should enable us to fuse the branches of the profession, in the belief that there is in affairs, as in nature, a power of self-adjustment, better than the wisdom of artificial rules and 'protective restrictions'" (Scot. Law Rev., 1888, p. 44). That remark was made relative to the proposal to "fuse" the advocate and "Law Agent" branches of the profession. It is thought that it has as forcible a bearing upon the question and proposals discussed in the foregoing pages.—I am, etc.,

NOTARY PUBLIC.

Reviews.

Juridical Styles. A Complete System of Conveyancing, adapted to the present Practice of Scotland and the recent Statutes, comprehending the Constitution, Transmission, and Extinction of Heritable and Moveable Rights and Forms of Process in the Supreme Courts of Scotland. By the Juridical Society of Edinburgh. In Three Volumes. Vol. III.—Forms of Process in the Supreme Courts of Scotland. Third Edition. Edinburgh: Bell & Bradfute. 1888.

WE are not going to attempt to review this work in the conventional sense. We take it to be a wholesome rule that nobody should attempt to review a book which he has not read, and we venture to affirm that the only three men under the sun who have read the portly volume before us through from beginning to end, are the three members of the Revising Committee, Mr. Henderson Begg, Mr. Christopher Johnston, and Mr. John Rutherford, who, we are credibly informed, went carefully over every line of the book at least twice. Their names should be mentioned with all

honour, for a more thankless and even ghastly task than beating into shape this huge collection of forms and precedents, it is hard to imagine. It is, we believe, some four years since the Revising Committee were appointed; but long before the work had been on the irons. For at least twenty years men have been working upon it, and but for the pressure which had at last to be put upon them by the Revisers, the Jews would have come to Jerusalem before the work was done. It was, we believe, in the Sixties that the preliminary meetings in connection with this volume were held. Men are now seniors and sheriffs who had not donned the wig when the earliest of the styles now printed were first blocked out; and some, alas! whose hands have busied with this task, have long ceased to labour beneath the circuit of the sun. The late William Reid, W.S., was one of the earliest and most active promoters of this volume. During the greater part of his professional life he carried on the work at such intervals as business claims allowed him, and death found him still busy at it as convener of the Revising Committee.

Unlike the two preceding volumes of the Styles, the third volume is from beginning to end almost entirely new. The form of pleadings has so entirely changed, and the scope of the volume has been so enlarged, that the last edition of "Signet Letters" was not in any sense even the basis or groundwork of the present volume. The second edition contained little more than the styles of writs which passed the Signet. But the volume before us is a complete collection of precedents for practice, in all its varieties of form, before the Supreme Civil and Criminal Courts of Scotland. There is, besides, a most exhaustive collection of forms of diligence, which, if we mistake not, will prove the most useful part of the whole work. The gain to practitioners in both branches of the profession by the publication of this volume is immense. It brings order where formerly there was confusion; it makes beaten tracks where before there was a pathless wilderness. After the labours of this Revising Committee, the preparation of an out-of-the-way writ is to what it was before they compiled this volume, what a journey across the Highlands after General Wade is to what it was before that excellent officer made the rough places plain. It is not merely that the forms are now to hand which will commend themselves, so far as we are able to judge by cursory inspection, by their terseness and perspicuity, but that the draftsman can now work with confidence, in the knowledge that he is following a precedent whose authority the Court will recognise. It is a peculiarity of the Juridical Styles—based upon what we do not know, but clearly recognised—that alone amongst private publications they command instant authority from the moment of issue.

There is a story told of a gentleman who was once a *habitué* of the Parliament House, and wrote something upon procedure. A daily paper reviewed the publication, and in the course of the

article it described the writer as "a modern Flavius." This puzzled him much, as he did not know whether to take it as a compliment or as an insult, but his doubts were dispelled when an ill-natured junior addressed him, "I say, so and so, it's too bad to call you a Flavius. You know who Flavius was? Not sure, eh! Why, he was a low skulking hound of a spec. agent, who hung about the Roman Courts, ransacked the counsels' boxes when they weren't looking, got fellows to sign defences for other counsel whom he pretended had drawn them, and marked fees which he never sent." It is credibly said that the enraged author consulted counsel on the strength of this information as to the propriety of raising an action of slander against the offending paper, but as he was fortunate enough to fall into the hands of a more accurate classical scholar than his original informant, the matter went no further.

We are not sure that the members of the Bar who have been concerned in the preparation of this work will escape the reproach of their brethren, that they have played the part of Flavius, and divulged the secrets of the profession to the solicitor world. In the interests of clients, it may be hoped that notwithstanding the assistance they get from the work before us, solicitors will still continue to employ counsel to prepare pleadings. It is seldom that the conventional fee of three guineas for preparing a summons or a petition amounts to so much as an agent's drawing charge of 6s. 8d. per sheet; and when it comes to be 6s. 8d. a sheet to an agent for drawing, and two guineas to counsel to revise, it is but poor sport for the client.

We make no attempt to criticise particular styles, but we are struck by an immense improvement in some classes of styles, notably entail petitions, which seem particularly well done, in the abandonment of the absurd system of quoting long sections of Acts of Parliament. Within the last thirty years thousands of pounds have been thrown away in charges for drawing, extending, and printing this absolutely useless matter. We observe that the editors treat it as an open question whether the law of deathbed is still in force in Scotland, the statute repealing the law having been itself *per incuriam* repealed. We think it a mistake to have suggested this doubt, for there can be no question that the general provisions of the Statute Law Revision Act clearly cover the case, and leave no room for the contention that the repeal of the statute revived the law.

We heartily commend this work to the profession, and we congratulate the Society on the completion, splendid though tardy, of a new edition of the great work which is associated with their name. Above all we congratulate the Revising Committee. It is said that the devil shut himself up for a year to learn Basque. We don't know the result. But if it be desired to keep the gentleman busy for five times the period, let him be turned on

to edit the next edition of the third volume of the Juridical Styles. It will be long, however, before a new revision is required. If each member of the Revising Committee cannot quite exclaim with Horace,—

*“ Exegi monumentum aere perennius
Regalique situ pyramidum altius,”*

he may at least with some assurance prophesy,—

*“ Non omnis moriar, multaque pars mei
Vitabit Libitinam.”*

Appointments.

THE LORD ADVOCATE (Mr. J. P. B. Robertson, Q.C., M.P.) has been sworn in a member of Her Majesty's Privy Council.

SIR CHARLES J. PEARSON has been appointed Sheriff of Renfrew and Bute, in room of the Hon. H. J. Moncreiff (Lord Wellwood). Naturally this appointment has given the greatest possible satisfaction within these counties. Sir Charles was called to the English Bar (Inner Temple) in 1866, and was admitted a member of the Faculty of Advocates in 1870. He is also procurator for the Church of Scotland. Mr. Alexander Blair succeeds Sir Charles Pearson as Sheriff of Chancery. He was admitted to the Faculty in 1860.

MR. A. GRAHAM MURRAY has been appointed Advocate-Depute in room of Mr. Blair. Technically there is no such appointment as Senior Advocate-Depute, but practically such a distinction exists, and Mr. Graham Murray has been appointed Senior Advocate-Depute over three Deputes who are all his seniors at the Bar. Of Mr. Murray's eminent qualifications for the office of Advocate-Depute there can be no question, and his appointment will undoubtedly strengthen the service. But the appointment created some surprise, and there was a feeling that if he desired to see criminal practice, Mr. Graham Murray should have been simply appointed an Advocate-Depute in the ordinary course. Mr. Murray's position at the Bar, however, is such that he could hardly have been expected to take the Junior Deputeship, and his services could be secured only by appointing him Senior Advocate-Depute. We are no adherents of the principle of seniority in public appointments, and if the Senior Deputeship had been an office of decidedly larger responsibility, there would be no objection to an exceptionally strong man being promoted over the heads of seniors in the service. But the Deputes have all equal responsibility. The advantage of the Senior Depute is that he does not go on Circuit, but takes instead the Edinburgh work, and accordingly his private practice is not

seriously interfered with. In the general case it would not be in the interests of the public service that the arrangement of public appointments should be altered to suit the private convenience of individuals, and it is certainly not in the interest of the members of the legal profession that patronage should be so arranged as to allow public office to be combined with the maximum of private professional emolument. In the circumstances of the case, we have no warrant to censure the present appointment, and we are sure that the arrangement was not suggested or sought after by Mr. Murray, but we cannot forbear an expression of regret that the entry to official life of so distinguished a member of the profession should have been signalized by a departure from the traditions of the public service and the old-established etiquette of the Scottish Bar.

THE CHIEF-JUSTICESHIP OF THE GOLD COAST.—An appointment worth £1500 a year is at present vacant owing to the retirement on pension of Mr. Hector William Macleod, Advocate. The reputation of the Gold Coast is improving. The Barbadoes Mutual Insurance Company puts it on the same level as British Honduras, and demands an excess premium of nearly 6 per cent., while the Legal and General accepts picked lives at an excess premium of $2\frac{1}{2}$ per cent. Mr. Macleod is therefore to be congratulated on having demonstrated that a pension *can* be earned on that shore.

MR. J. W. MACCARTHY, Barrister, has been appointed Acting Queen's Advocate of Sierra Leone during the absence—as we regret to learn, on sick leave—of Mr. J. K. Donaldson, Advocate. Mr. Donaldson is very popular in the colony, and has made an excellent Crown prosecutor.

Obituary.

SIR RICHARD BAGGALLAY.—"Out of sight, out of mind," is a saying which would seem to be true of judges. The notoriety of a cause at the trial of which he presides may put a judge's name in the mouth of every citizen, great or small, and render him the best known of public officials. He plays a prominent part in his time. It is, however, a cynical commentary on such a fame, that it seems to cease with his time, or even before it. It is only three years since Lord Justice Baggallay retired from active duty, owing to failing health; and yet when his death was announced the other day, we heard the remark made, "Dear me! I thought he died some time ago." Sir Richard died on the 13th November. His career was that of a successful political lawyer, who became an admirable judge. From Caius College, Cambridge, he pro-

ceeded to London, and was, in 1843, called to the Bar by Lincoln's Inn, at the age of twenty-seven. He took silk in 1851, and was made a bencher of his Inn. Sir Richard entered the House of Commons in 1865, being returned for Hereford in the Conservative interest. Thereafter he twice unsuccessfully contested Hereford; but was returned for Mid-Surrey in 1870, and again in 1874. Sir Richard held the office of Solicitor-General for England for some months in 1868, and again for a couple of months in 1874, on the return of his party to power. He succeeded Sir John Karlake as Attorney-General. In 1875, Sir Richard Baggallay was appointed a Lord Justice of the Court of Appeal, and a member of Her Majesty's Privy Council. The late Lord Justice was one of the most amiable, courteous, painstaking, and scrupulous judges the English Bench has ever known.

THE LATE CHARLES ROBERTSON, ESQ., ADVOCATE.—The death of Mr. Charles Robertson removes from among us one who though never attaining to any considerable professional practice, is well deserving to be held in special remembrance. His personal qualities, his high character, and the good work which he did in the Faculty of Advocates commanded the respect and esteem of all. The sixth son of George Robertson-Scott, Esq. of Benholm, Advocate, Charles Robertson was born seventy-nine years ago, and, having elected to follow his father's profession,—which an elder brother, who afterwards was honourably known as Lord Benholm, an able and upright judge, had already adopted,—he was admitted a member of the Faculty of Advocates in 1834. His career at the Bar may be shortly summarized. After spending even more than the usual number of years in walking the boards of the Parliament House without having his merits officially recognised, he was in 1862 appointed Treasurer of the Faculty, an office which he held until 1883, when he resigned; with this was united the Treasurership of Chalmers' Hospital, which is under the direction of the Faculty. In 1864 he was made Presenter of Signatures of Crown Writs, being the last holder of the office, which was abolished by the Conveyancing Act of 1874. After he resigned his Treasurership to the Faculty and the Chalmers Trust, the latter of which he held till 1885, Mr. Robertson lived very much in retirement, a natural shyness of disposition being aggravated by the loss of eyesight, the result of an unfortunate shooting accident which occurred when he was beyond middle life.

It is not, however, so much from his professional qualifications that Mr. Robertson will be remembered, as from the good work which he did as Faculty Treasurer. When he assumed office the Parliament House was a somewhat bare hall, destitute of adornment of any sort, and depending on its own noble proportions and characteristic roof for any beauty which it had. Mr. Robertson set himself to remedy this state of matters, and by his exertions

a collection of pictures began to be formed, which ultimately resulted in the superb series of portraits of Scottish lawyers which now grace the walls of the Parliament House. The windows of the hall were all filled in with stained glass and made worthy of their situation, and many minor, though not less praiseworthy, alterations were made, which added to the comfort and convenience of the practitioners before the Courts. His care of the finances of the Faculty was unceasing; and when he resigned his office he was able to point to a very remarkable change for the better in these funds. It is no secret that when there was anything which he thought would tend to the good of the Faculty, but which there was any difficulty in supplying from the funds, he had no hesitation in personally defraying the expense. The three beautifully carved oak mantelpieces which adorn the Parliament House are owing in a large measure, if not altogether, to his private liberality.

As might be expected from what has been said above, Mr. Robertson was in private life held in high regard by his friends. He was amiable and accomplished, and was especially fond of music. Few men were more generous; and many a suffering family and languishing invalid can speak with heartfelt thankfulness of his unostentatious liberality,—he was, indeed, a man who let not his left hand know what his right hand did.

On the occasion of Mr. Robertson's retirement from the Treasurership in 1883, he was entertained by the Bar at dinner, and his touching reply to the toast of his health will no doubt be remembered by those who were there.

Mr. Robertson married a daughter of the late James Walker, Esq., of Dalry, and it is owing to her unremitting attention and loving care that he was enabled to spend the last years of his life, clouded as they were by the shadow of physical infirmity, in that comfort and cheerfulness which these years displayed.

The Month.

THE Solicitor-General opened the present winter session of the Scots Law Society in Edinburgh University, on 5th November. In his address, which we have the privilege of printing this month, Mr. Darling dealt with the progress made by Scottish jurisprudence during the existence of the Society—a period certainly very fruitful of change. Change does not, it is sometimes needful to reflect, necessarily mean progress; and the department of Scots Law contains some striking illustrations of the fact. But on the whole it was a tale of great improvement that Mr. Darling had to rehearse. We endorse the opinion with which he qualified his commendation of the more humane ideas as to punishment which now prevail. In cases, undoubtedly amounting

to murder, there is too often a tendency on the part of Scottish juries to shrink from returning the proper verdict, and to take refuge in the milder finding of culpable homicide. It is a very natural inclination. But it is unfortunate, and no effort should be spared to counteract it. It is to be feared, however, that the tendency is not confined to charges of murder. In cases involving far less grave consequences, a reprehensible inclination to give play to one's pity or timidity is not unfrequently followed. Nor, we venture to think, is this over-indulgent practice the failing of juries alone. Is there not perceptible a similar tendency on the part of public prosecutors in accepting pleas to the minor charge? And is not the effect of this leniency, not only direct, but indirect as well—by way of example to juries? Flabbiness of sentiment, in different degrees, is pretty widely spread in this country.

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Glasgow Juridical Society.—The annual public address of the Glasgow Juridical Society was delivered on 15th November by His Excellency the Hon. E. J. Phelps, the American Minister in this country. Mr. Phelps devoted his address in great part to the question, "What is Justice?"—touching, however, on many topics besides. He told his audience that he had seen nothing in this country more admirable than its administration of justice—a tribute worth having from such a source. Mr. Phelps commented on a change which must have struck many. Time was, he said, when the lawyers were esteemed to be pre-eminently the speech-makers. But they had been in latter days so far surpassed in that accomplishment by other classes in society, that they were no longer entitled to this questionable distinction. The limits of forensic discourse were grave impediments to the cultivation of eloquence, which in its modern estate needed to be unembarrassed by facts, unrestrained by occasion, unlimited by time. So the Bar fell into what might be called, in comparison with discussions elsewhere, a measurable silence. Whatever be the explanation of it, it is an unmistakeable fact to which Mr. Phelps alludes. The forum is no longer a nursery for orators. There are lawyers who are nevertheless creditable speakers. But their rarity is great.

* *

The Universities Election.—The Solicitor-General has been returned to Parliament as member for the Universities of Edinburgh and St. Andrews. The election has occasioned some complaint, both from his political supporters and his opponents, on the ground that university representation is endangered by the return of law officers. We agree with the objection, in so far as we also think that university representation is imperilled by such action. It is a specious cry, and may do harm to such representation. But if we are to pronounce judgment upon the objection

on its merits, we dissent entirely from it. Why should law officers not be returned to Parliament? Is it in the interests of Scottish business in the House of Commons, of care and precision in the framing of statutes, or of the legal profession in Scotland, that the law officers for Scotland should not be in Parliament? We say nothing of the present holder of the seat, but surely the law officers who have sat for university constituencies, Moncreiff, Gordon, Watson, and Macdonald, were men far above the ordinary run of Parliamentary representatives, and men whom it was desirable to have in the House. There are many objections to university representation which are quite worthy of consideration, but we do not think it a reasonable one that such representation enables distinguished Scottish lawyers to enter Parliament. There were no university seats in 1858, and it is hardly, we think, a reflection in which Scotsmen need take pride, that the greatest Scottish lawyer of this generation had to find a seat in an English borough.

* *

Law Officers' Salaries.—According to a Parliamentary paper issued the other day, the emoluments of the law officers are as follows:—The salary of the Attorney-General is £7000, and, with fees, the average income for the past ten years has been £11,375 per annum. The Solicitor-General receives a salary of £6000, and the average income reaches £8905. The Lord Advocate receives £3279, 10s. in salary, and the average income amounts to £3768. The Solicitor-General for Scotland receives £955 in salary, and the average income is £1198. The Attorney-General for Ireland receives £5000 in salary, and the average income is £8110; and the Solicitor-General for Ireland receives £2000 in salary, and the average income is £2835. It seems as plain as a pikestaff that either the Irish law officers are monstrously overpaid, or the Scots officers grossly underpaid. Formerly the Solicitor-General for Scotland was not expected to be in the House. Now it has become the practice for him to be a member of Parliament, and if he is in Parliament, the whips, in virtue of his being a member of the Government, can compel his constant attendance. There can be no doubt that, under these conditions, the remuneration of this officer is inadequate, in view of the sacrifice of his practice at the Bar.

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Lord M'Laren.—We understand that Lord M'Laren has gone to Egypt for the benefit of his health, and that he is not likely to be back in this country until after the February week at earliest.

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The Whitechapel Murders.—At least one other murder has been perpetrated in East London, in all respects of the same character

as the previous outrages there. Again the theory of insanity has been loudly set up. There have been two noteworthy exclaimants (if we may be allowed the word) to this effect. A gentleman, whose knowledge would appear to be more diffuse than accurate, and by much more philological than pathological, is said to have predicted the crime on the occasion of the *new* (*sic*) moon, in consequence of the well-known effect of *new* moons on lunatics! Dr. Forbes Winslow, too, was early in the field. It is not a matter of temporary hypothesis with him, be it marked: it is a matter of final certainty. "It is the work of the same homicidal lunatic who has committed the other crimes in Whitechapel," he says. "The whole harrowing details point to this conclusion. The way in which the murder was done, and the strange state in which the body was left, are not consistent with sanity." The elapse of periods of time between the murders, Dr. Winslow ascribes to lucid intervals. His conception of the daring assassin is one which we venture to think few alienists will be able to find many concrete examples of, either in their own experience or in their reading. It is that of "a lunatic suffering from homicidal monomania, who during the lucid intervals is calm and forgetful of what he has been doing in the madness of the attack," and about whom no traces of the deed linger, and with no premonitory symptoms. Dr. Winslow calls upon those in authority "to drop the red tapeism surrounding a government office"—whatever that may be, though it is obviously something which does not please Dr. Winslow. In creditable contrast to this effusion, is the thoughtful letter of Dr. Batty Tuke, in a recent issue of the *Scotsman* newspaper. Dr. Tuke reaches the opposite conclusion, and he reasons (does not fly) to that conclusion.

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IN the Parliament House ceremonies have been rife of late. On the 30th October, the Right Honourable J. H. A. Macdonald, Q.C., presented his commissions to the Court, and ascended the bench as Lord Justice-Clerk, with the courtesy title of Lord Kingsburgh. On the same occasion the newly-appointed Lord Advocate (Mr. J. P. B. Robertson, Q.C., M.P.) and Solicitor-General (Mr. M. T. S. Darling) also presented their commissions. A week later the installation of the Honourable Henry James Moncreiff as a Lord of Session took place. Mr. Moncreiff took the title of Lord Wellwood. The Bench is thus once more fully manned.

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THUS twice within eight days the frequenters of the Parliament House have had an opportunity of witnessing the time-honoured ceremony of a Lord Probationer standing his trials before the Lords of Council and Session. The custom is of very ancient

origin; having been first introduced by an Act of the year 1579. In its present form it is still regulated by an Act of Sederunt, passed more than two centuries ago—on 31st July 1674. That Act provides, that “when any new Lords of Session shall be presented by His Majestie, for tryall of their qualifications, they shall sitt three days, beside the Ordinary, in the Outter-house, and shall have inspection of such processes as shall be carried to interloquitor, and shall make report of the points taken to interloquitor, in presence of the whole Lords: As also, for compleating their tryall, they shall sit one day in the Inner-house, and after any dispute is brought to a period, and the Lords are to advise the same, in order to the pronouncing their interloquitor, they shall resume the dispute, and first give their opinion thereanent in presence of the whole Lords.” The ceremony, however, has come to be much shortened in our day. The subject-matter of the trial, so to speak, is now limited to two short cases in the Outer House, and one short case in the Inner House. In place of occupying four days as formerly, when time was less valued, the entire proceedings of presenting his commission, standing his trials, taking the requisite oaths, and assuming his seat on the bench, now occupy the Lord Probationer only the part of one morning. In the case of Lord Kingsburgh, the ceremony was ended by noon. With Lord Wellwood, a week later, it was slightly more protracted, owing to the apparently unexpected length of the Reclaiming Note, which was heard before his Lordship; but even in his case the proceedings were all over before one o'clock. The only other divergence from the letter of the old Act of Sederunt which modern custom has introduced, is that the Lord Probationer makes his report of the cases to their Lordships of the First Division alone, and not “in presence of the whole Lords.” All the judges are thereafter summoned to the bench of the First Division court-room, and the Lord President reports to them that the Lord Probationer has passed his trials “to the satisfaction of this Court.” There is still, of course, a power of rejection on the part of the Lords of Council and Session, though we are not aware that it has ever been exercised on the ground of failure to pass a satisfactory trial. This power is regulated by 10 Geo. I. c. 19, an Act “for explaining the law concerning the Trial and Admission of the Ordinary Lords of Session,” which proceeds on the preamble that His Majesty is desirous that none but persons of probity and understanding in the laws be admitted as judges. It contains the important proviso that, should the Lords of Session reject after trial any person whom His Majesty has nominated, if nevertheless the Sovereign afterwards signify under the sign-manual the royal will and pleasure that the person so nominated shall be admitted and received into the said place of judge, in such a case the Lords of Session are required forthwith to admit and receive him accordingly.

THE Act of George I. referred to was the outcome of the only instance of an exercise by the Court of its power of rejecting the nominee of the Crown. Mr. Patrick Haldane was appointed by the king in 1721. The Court sustained an objection to his appointment (raised by the Dean of the Faculty of Advocates and the principal Clerks of Session) on the ground that he was not qualified in terms of the 19th Article of the Treaty of Union, he not having served five years as an advocate in the College of Justice. The House of Lords reversed this interlocutor (Robertson's Appeals, 422), and ordered the judges to proceed with his trials. An objection was next stated to the moral character of Mr. Haldane, and, on a proof, the Court was almost equally divided in its opinion. Of the Ordinary Lords, seven were in favour of his rejection, and six in favour of his admission; but two Extraordinary Lords being with the minority, there was thus a majority of the whole Court voting for the admission. This state of matters caused a further objection to be raised as to the right of the Extraordinary Lords to give votes in such a case. The point was referred to His Majesty. The result of the whole matter was that Mr. Haldane's nomination was cancelled, and the Act of 1723 passed. In addition to the provision before mentioned, the statute obviated the possibility of similar complications in the future by the abolition of the office of Extraordinary Lords.

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Lord Kingsburgh.—Even to many of the most intimate friends of the Lord Justice-Clerk, the announcement that he was to adopt the judicial title of Lord Kingsburgh came as a surprise, and there was a very general inquiry, "Where is Kingsburgh?" The answer that Kingsburgh was in Skye did not throw much light upon the matter, as nobody had supposed that it was in Wales. But accepting the reply as sufficiently indicative of the geographical situation of the place, the further question presented itself, What is Kingsburgh? and to this the County Directory replied that Kingsburgh is a farm, nine and one-half miles from Portree, of which one Lewis Mitchell is tenant. This did not help one much further. What had this city lawyer, whom everybody had known for a generation as a feature on our streets—an Edinburgh man of Edinburgh men—to do with a farm in Skye? The answer, it appears, is, that his Lordship's grandmother was a Miss Susannah MacAlister, whose mother was a Miss Anne Macdonald, daughter of Alexander Macdonald of Kingsburgh. It may appear that a relationship which passes twice through the female line is but a slender warrant for a territorial title. But doubtless his Lordship was influenced in his selection by the Jacobite associations of the place. Alexander Macdonald entertained Prince Charlie at Kingsburgh, and his son, Allan Macdonald, a great-grand-uncle

of the Lord Justice-Clerk, married Flora Macdonald. Had his Lordship adopted a territorial title from the home of the branch of the Macdonald family to which he belongs, he would have taken his seat upon the bench as Lord Bernisdale and Scalpa. That sounds badly, and we are glad that his Lordship, faithful alike to the traditions of the profession and to euphony, has chosen in preference the title of Lord Kingsburgh.

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Lord Wellwood.—The Hon. Henry J. Moncreiff has, on his elevation to the Bench, assumed the judicial title of Lord Wellwood. Wellwood is not a territorial but a family name. His Lordship's great-great-grandmother was Catherine Wellwood, eldest daughter of Robert Wellwood of Garvock. She married the Reverend Sir William Moncreiff, minister of Blackford. The estate of Tulliebole was purchased by Mr. Wellwood for his daughter. The connection of the Moncreiff family with the estate is, however, of older date, as Sir William's mother was Catherine Halliday, daughter of John Halliday of Tulliebole. Although the estate has been for nearly a century and a half in the Moncreiff family, it has never been more than an occasional family residence, and we doubt if a Moncreiff were ever born there. This is owing, however, to no neglect of the old seat, but to the industry and activity of the proprietors, none of whom have been content to sit at home, but who have all carved out distinguished careers for themselves. Sir William (himself a minister's son), as we have seen, was minister of Blackford. His son, Sir Henry Wellwood, was minister of St. Cuthbert's Church, Edinburgh, and was one of the most distinguished divines of the day. His son again, Sir James Wellwood, after being Dean of Faculty, became a Lord of Session. His eldest son, Sir Harry Wellwood, entered the ministry of the Church of Scotland, came out at the Disruption, and lived to be one of the leaders of the Free Church. Sir Harry's still more distinguished brother, Lord Moncreiff, is still amongst us; and the latter's son, Lord Wellwood, maintains the judicial tradition to the third generation.

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The Kilmarnock Murderess.—The old woman who was sentenced to death by Lord Shand at last Glasgow Circuit, for the murder of her grandchild, has been respited. We suppose there were reasons for this act of clemency. We do not understand them. The last executions in Scotland were of poachers, if we mistake not. We thought these men properly hanged. But the guilt of poachers, or even of burglars who kill, is, in our view, less heinous than that of a woman who, deliberately and in cold blood, runs a blade through the heart of the helpless babe in her lap—the fruit of her own womb—and all for the sake of a few paltry shillings

from a benefit society. Neither the burglar nor the poacher mean to kill if they can help it. They are reckless of life, but they do not coolly conspire to take life. No poacher, and few burglars, but what would prefer to forego the night's work if they foresaw that it must end in blood. But for the child murderess there is, in general, nothing to be said. Under no system of jurisprudence could her guilt be classed as murder in the second degree. The only distinction between her case and that of the wife poisoner is that her victim is yet in infancy. But we cannot recognise this as a mitigating circumstance. In the history of the world contempt for child life has been characteristic either of extreme barbarism or of a rotten civilisation. The first attack upon Christianity took the form of a wholesale massacre of infants. The conception of humanity which Christianity infused into the race has attached a sanctity to infant life which we trust the administration of the law will never do anything to impair.

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Public Meetings in Ireland.—Great legislators are not always accurate lawyers. Mr. Gladstone fell into a curious mistake the other day at Birmingham. Referring to the inequalities under which Ireland labours, he said: "In Ireland the Lord Lieutenant can forbid a public meeting; he can forbid it by the use of the most general and vague terms, in which he is authorized by the Coercion Act to exercise its powers. There is no power of calling him to account before a Court of Justice. We asked in the House of Commons that that power might be given. It was refused, and we were not able to obtain even a discussion of the question, because the system called the Closure was put in operation to prevent us arguing that the Irishman ought in this vital matter to have equality of rights with the Englishman." Now from beginning to end of the Crimes Act of 1887 there is no mention of public meetings, and no authority is given to the Lord Lieutenant to proclaim them. As a matter of fact, all the proclamations of such meetings which have been issued in Ireland within the past year or two have been made at common law. What was running in Mr. Gladstone's mind, no doubt, was the following provision of the Irish Crimes Act of 1882, which expired in 1885:—

"10 (1) The Lord Lieutenant may from time to time, by order in writing, of which public notice shall be given and published in the prescribed manner, prohibit any meeting which he has reason to believe to be dangerous to the public peace or to the public safety. A copy of such order shall be forthwith served in the prescribed manner, if possible, on the promoters of such meeting."

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The Bahama Case.—The facts to which we gave publicity in our issue of last month in regard to a sentence of extraordinary

severity, summarily passed by the Chief-Justice upon a prisoner who assaulted him upon the Bench, having been brought to the notice of the Secretary for the Colonies, the Chief-Justice has been sharply rebuked for his indiscretion. A question was put to the Under Secretary in the House of Commons upon 12th prox., when the following statement was made by Baron Henry de Worms in answer to questions from Sir Henry James and Mr. Pickersgill: "On the 27th of July, Thomas Taylor having been sentenced by the Chief-Justice of the Bahamas to seven years' penal servitude for burglary, committed an assault upon the Chief-Justice in Court, and upon the 31st of July the Chief-Justice sentenced him to penal servitude for life, and ordered him to receive thirty lashes. The increased sentence appears to have been inflicted as a punishment for the assault as a contempt of Court, without any trial. The Secretary of State has not been informed whether the sentence of whipping was carried out. A report of the sentence, which is stated to be a correct copy of the record, is contained in the *Nassau Guardian* newspaper of August. The Secretary of State has given instructions that Taylor is to be released after serving the sentence inflicted upon him for the burglary, and the Chief-Justice has been informed that should any such grave miscarriage of justice occur again, it may have very serious consequences for him."

Mr. Pickersgill—"Will the honourable gentleman inquire whether the sentence of whipping was carried out?"

Baron Henry de Worms—"I will."

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Contempt of Court.—Another curious case of contempt has occurred in the Colonies. It appears that upon the 9th of July last, Mr. De Souza, a coloured barrister practising in British Guiana, was sentenced by Chief-Justice Chalmers, Mr. Justice Atkinson, and Mr. Justice Sheriff, to be imprisoned for six months, and to pay a fine of 500 dollars, for contempt of Court in writing a letter to the *Royal Gazette*, reflecting on a decision of the judges. Chief-Justice Chalmers is a member of the Faculty of Advocates.

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WE know nothing of the merits of the foregoing case, but we confess any manner of treating contempt seems preferable to that adopted by the judges on the Parnell Commission, the other day, during the scene with Mr. E. Harrington. "Let the Court be adjourned," said the President, "since I can't obtain decorum;" and forthwith he walked out, followed by the other judges. A quarter of an hour afterwards they returned, and the dispute was patched up. Now such a mode of procedure seems to us quite unworthy of the dignity and authority of a Court of Justice, and savours far too much of the conduct of the weak husband, who, unable to

assert his authority in his own house, and yet too proud to succumb to the scold, sneaks away out to the club for peace's sake. We have much to learn in Scotland, but not in that direction, we trust. Can fancy's wildest flight picture either Division of the Court of Session cheived out of their own Court-room by the rudeness of an unruly Irishman?

That the Commissioners themselves were sensible that they had not adequately maintained the dignity of the tribunal, was made manifest by their subsequent action in summarily sentencing Mr. E. Harrington to pay a fine of £500 for a very gross contempt, contained in an article published in his paper, the *Kerry Sentinel*. In our view, the Commissioners acted wisely in imposing a heavy fine in place of committing Mr. Harrington to prison, where he would have been treated as a first-class misdemeanant, and might have passed a very pleasant Christmas.

* * *

ALTHOUGH the First Division had no difficulty in disposing of the question raised in the case of *Munro v. M'Geogh* (Nov. 15, 1888), still the decision is important, as settling a matter in regard to which Outer House decisions have recently varied. The case was one in which a landlord sued his tenants for arrears of rent, and the defence stated was that the tenants were entitled to retain part of the rents successively falling due in name of abatement from the rent, on the ground that by the landlord's failure to execute certain stipulated repairs on farm-buildings and fences, the tenants had not obtained full possession of the subjects let. Under many of the old decisions this was held not to be a relevant defence, so stated. In *M'Rae v. M'Pherson*, 6 D. 302, and *Dods v. Fortune*, 16 D. 478, similar defences were repelled. But the First Division, without referring specially to these cases, or to the other older cases which reach an opposite conclusion, held that (as in the recent case of *Muir v. M'Intyre*, 14 R. 470), it was never now questioned that such a defence was relevant, and accordingly they adhered to the Lord Ordinary's interlocutor, allowing a proof. In recent years the case of *M'Rae* above quoted has been followed in the Outer House, and accordingly the judgment now pronounced will be valuable in settling a matter about which there was some uncertainty.

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Before the Shirra'.—Guffie, Solicitor (sharply) "Hand me that account."—Tosh, Advocate (grandly). "We members of the Bar are not accustomed to be addressed in that manner in the Sheriff Court" (shies the account across the table).—Guffie (quietly). "We of the Sheriff Court, solicitors though we be, are not accustomed to have productions thrown at our heads."

Negligence in Delivering a Telegraph Message.—It has been held in the United States, that the mental suffering caused by plaintiff's inability to reach her brother before his death, or in time for his funeral, caused by a telegraph company's negligence in failing to deliver messages sent to her and paid for by her, is a proper element of damage in a suit by her against the company for damages.—*Wadsworth v. W. U. Tel. Co.*, S. C., Tenn., April, 1888; 38 Alb. L. J. 87.

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Use of Poisons in Manufactures.—A manufacturer used a common mordant in dyeing certain cloth, by handling which a purchaser was poisoned; but the mordant was not at that time known to be poisonous to handle—the injury in question being the first known instance of injury from it. *Held*, that the manufacturer was not liable. Mass. Sup. Jud. Ct., June 21, 1888. *Gould v. Slater Woollen Co.*—Opinion by C. Allen, J.

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The Price of Proclaiming Marriage Banns.—Alexander M'Clure, who was recently charged 10s. for proclamation of banns in Flowerhill Parish Church, Airdrie, sued the kirk-session in the Small Debt Court for 7s. 6d., being the difference between the amount paid and the fee legally exigible. The case came before Sheriff Lees, who recently gave judgment in favour of the pursuer. His Lordship pointed out that not more than 2s. 6d. can be exacted for the proclamation of banns in any church, and that the limitation of the announcement to one Sunday does not warrant the session-clerk in charging a higher sum.

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A Novel Intromission.—In an action of count and reckoning at present pending in the Outer House of the Court of Session, the first plea-in-law for the pursuer is as follows: "1. The defender having intromitted with the means and estate of the pursuer's father and mother, and also with the latter's second husband (*sic*), is liable to count and reckon with the pursuers."

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Football and the Factory Act.—At Dundee recently, a biscuit manufacturer was charged before Sheriff Campbell Smith with contravening the Factory and Workshops Act, 1878, by employing five boys at four o'clock in the morning, on Saturday, 3rd November, when they ought not to have been employed earlier than six o'clock. It was explained that on the morning in question the lads went to their work early of their own free will, in order that they might get away sooner, as they wished to attend a football match. The Sheriff, *therefore*, found the charge *not proved*.

"If we ever get time," says the *Albany Law Journal*, "we shall write a book on the humorous phases of actions for negligence brought by servants against masters, and in it we shall include the case of *Reinig v. Broadway Railroad Co. of Brooklyn*, 49 Hun. 269. It was held that where a servant is directed to clean off the snow from a roof, and in returning to the ground after doing so, in order to avoid a snowdrift at the bottom of a ladder on which he is descending, jumps off the ladder and falls through a skylight in the roof, which is so covered with snow that it cannot be seen, he has no right of action against his employer for injuries arising therefrom. A case almost as impudent as this was that of a brakeman out west, who sued his company because he slipped on the icy ground along the track. He seemed to think the company should have sprinkled it with ashes. There is another recent skylight case in our Court of Appeals, brought by a child of a tenant against the landlord for falling from an upper storey through a skylight. Such injuries are painful, no doubt, but we do not see how the maintainer of the window-panes is to blame."

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Shaking Hands with Jurors.—A good story is told of a prominent lawyer who recently came to Boston from another State, and who is noted for his way of putting himself on friendly terms with the jury. An old and severely virtuous lawyer was opposed to him in a case, and the time had come and gone by a few minutes for the trial to begin. "Well, gentlemen, why don't you proceed?" said the Court, to whom the old lawyer replied, "I perceive, your Honour, that there is one member of the jury with whom brother — has not yet shaken hands. If he will shake hands with him, we will be ready to go on."—*American Law Review*.

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The Man who makes his own Will.—At a Provincial Law Society's dinner, not long ago, the President called upon the senior attorney to give as a toast the person whom he considered the best friend of the profession. "Certainly," was the response, "the man who makes his own will."

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF FIFE.

MAYS v. KEIR.

Dunfermline, 30th October 1888.—*Held*, that the husband of an illegitimate child was bound to contribute along with the legitimate children to the support of their mother, where the marriage was prior to the Married Women's Property Act, 1877.

The circumstances of this case are explained in the Sheriff's interlocutor. The case was one in which a mother sued her illegitimate daughter and husband for aliment. The daughter was married in 1875, and the male defender received no means through his wife. After hearing parties' procurators, Sheriff Gillespie found that while a liability attached to the defenders to aliment the pursuer, if destitute, the pursuer's legitimate children were liable *primo loco*. Sheriff Principal Mackay reversed the decision of his Substitute. The following are the decisions of the Sheriffs:—

“*Dunfermline, 5th October 1888.*—The Sheriff-Substitute having heard parties' procurators, and considered the cause: Finds that while a liability attaches to the defender to aliment the pursuer, if destitute, the pursuer's legitimate children are liable *primo loco*: That a legitimate son of the pursuer's, who resides with her, is able to support her: Therefore dismisses the action, and decerns: Finds the defenders entitled to expenses, for which reserves right of action against pursuer's husband.
(Signed) DAVID GILLESPIE.

“*Note.*—Although it is not expressly stated in record, it was explained at the bar that the pursuer and a legitimate son live together. It is admitted that the son, who is twenty years of age, is able-bodied and not subject to any mental incapacity, but he seems to be one of those who prefer loafing to working. It was explained by defenders' agent, that while he was willing to help the pursuer out of his by no means superabundant means, he wished to keep this in his own hand, for if he was compelled by a judicial decree to pay money to the pursuer, every penny got from him would go to maintain the son in idleness. This is a natural and reasonable position to take in the circumstances, and the Sheriff-Substitute thinks that it is not inconsistent with law. It is no doubt settled that, in a question with the parish, an illegitimate child is bound to support his or her mother, if the mother has no other means of support; and it is also settled, that in the case of a daughter who has been married before 1st January 1878, this liability is transmitted to her husband. But there is no decision or authority to the effect that the liability of an illegitimate child to maintain the mother is co-ordinate with that of legitimate children, and in the absence of such authority, the Sheriff-Substitute declines to put legitimate and illegitimate children on the same footing as regards liability for the mother's maintenance, when the whole benefit of succession to the mother, if she dies possessed of means, accrues to the legitimate. The question here is not whether the pursuer is to be maintained by the public or by her relatives, but by which of the two sets of relatives she is to be maintained. It is practically a question between the son and the defenders.
(Intd.) D. G.”

“The Sheriff having heard parties' procurators, and considered the whole process, pronounced the following interlocutor:—

“Finds in fact—(First) That the pursuer, Mrs. Elizabeth Scott or Mays, who is a widow of fifty-eight years of age and unable from bodily infirmity to maintain herself, has five children; legitimate—(1) Cumberland Mays or Brown, wife of William Brown, grate-fitter, Camelon, Fal-

kirk; (2) Ann Mays or M'Lauchlan, wife of James M'Lauchlan, moulder, Bamsford, Falkirk; (3) Helen Mays, who is unmarried; (4) Isabella Mays, a minor, of about twenty years of age, who has no fixed occupation; and one illegitimate child, the defender Elizabeth Scott or Keir, wife of the defender William Keir, schoolmaster, Drunduff, near Dunfermline: (Second) That the said William Brown, James M'Lauchlan, and John M'Pherson contribute with more or less regularity the sum of 1s. a week to the aliment of the pursuer; that James Mays has, but only, during a period of two years, for six weeks, when he had regular employment, contributed the same sum, and that Helen Mays is unable to contribute towards the aliment of the pursuer: (Third) That the said total sum of 3s. a week is insufficient for the pursuer's aliment: (Fourth) That the defender William Keir has a sufficient income to enable him to contribute a sum of 1s. a week towards the pursuer's aliment: (Fifth) Finds in law that the defenders Mrs. Elizabeth Scott Mays or Keir and William Keir are liable to contribute towards the aliment of the pursuer: And with reference to the foregoing findings, Recalls the interlocutor of the Sheriff-Substitute of 28th September 1888, appealed against: Decerns and ordains the defenders as libelled to pay to the pursuer the sum of 1s. per week in advance, the first payment commencing as from 27th July 1888, and to continue thereafter during the lifetime of the pursuer or until the Court shall order otherwise: Finds the pursuer entitled to expenses: Appoints an account thereof to be lodged, and remits the same to the auditor to be taxed of consent on the lower scale, and decerns.

(Signed) "Æ. J. G. MACKAY.

"*Note.*—The question whether the husband of an illegitimate daughter is liable where the marriage was prior to the Married Women's Property Act, 1887, to aliment his wife's mother is, in the opinion of the Sheriff, settled by authority binding in the Sheriff Court. It was decided in *Swanson v. Davie* (24th November 1886, 14 R. 113), that an illegitimate child is liable to aliment the mother. It was decided in *Reid v. Moir* (13th July 1868, 4 M. 1050), that the husband of a legitimate child, and in *Wilson v. Todds* (February 1867, 3 S. L. R. 192), that the husband of an illegitimate child, is liable to aliment his wife's mother. The last case was a judgment of Lord Jerviswoode in the Outer House, but it was acquiesced in, and a precedent binding the inferior Court. The only distinction that has been suggested between the present and *Wilson's* is, that in it the husband of the illegitimate child was called on to pay the whole aliment, while in this case he is only called on to contribute with the legitimate children towards its payment. This is quite insufficient to make any distinction in law or equity. The right of the mother is to receive sufficient aliment for her subsistence from her children, and the obligation of the children, whether legitimate or illegitimate, is, if they can afford it, to contribute jointly or severally such aliment. Whether they are legitimate or illegitimate, this obligation is recognised by our law as a natural obligation. Some persons have found it difficult to understand what 'natural' in this sense means, or what the 'law of nature' is. There could be no better

illustration of it than the claim of a destitute mother to be supported by her children, whether legitimate or illegitimate. Although this arises from, it does not depend merely on, the act of birth, still less upon any possible right of succession. It is the return for the early nurture, the subsequent care and the constant solicitude of a mother for her offspring. This affection and conduct on the part of a mother, though they may be sometimes, are so rarely absent, that the law, which must often act on a general view, would not run much risk of practical injustice if it presumed the general to be the universal case. But even where a mother deserts her child—should such a child gain more than it needs of this world's goods, a contribution to keep her alive, or at least off the parish, may fairly be deemed a legal as it is a natural debt. It is a question of circumstances what proportion an illegitimate or a legitimate child is able to contribute after satisfying prior claims, but the natural obligation rests equally on all. The Sheriff may add that he entirely agrees with the result and principle of the decisions, and considers the present case as one in which their application is salutary.

"There is no doubt one point in the case as to which the law is in a peculiar condition, which may be altered by the Legislature, or possibly by the course of subsequent decision in the Supreme Court. A husband is not liable to aliment his wife's mother if the marriage took place after the Married Women's Property Act, 1877 (*M'Allan v. Alexander*, 7th July 1888, 15 R. 863), while he is liable if it took place before that date (*Reid v. Moir*, 13th July 1866, 4 M. 1060). As husbands of the labouring classes, who are the persons usually called upon to aliment the mothers of their wives, rarely receive, or have received, any money with or through their wives, the anomaly is considerable of making their liability depend on pecuniary considerations, and the date of their marriage. Such anomalies frequently, and sometimes necessarily, occur where alterations of the law take place. There is at all events no room to doubt what the law at present is as to the liability of a son-in-law. That being established, the propriety of the defenders contributing to the pursuer's support, in the circumstances of the case, appear to the Sheriff very clear.

"The Sheriff-Substitute erred in supposing that the present question turns in any degree on the conduct of the legitimate son. If the fact be that an able-bodied young man of his age, without other obligations of his own, does not contribute to his mother's support, it is no doubt discreditable, but the Sheriff is not entitled to assume this is a process to which the legitimate son in question is not a party. He may yet be sued to contribute towards the aliment if it is deemed expedient to do so.

"The Sheriff-Substitute seems also to have supposed that the sum sued for, if awarded—1s. a-week—would go to the support of the son in question in idleness. It would not go far in that direction even if so applied; but the question for the Court is whether 4s. a-week, the total of the contributions which can at present be got, is too much for the aliment of the pursuer herself. It certainly is not. The mode in which she may use it is not for the Court, though it may be hoped she will not stint herself in any way to support an

able-bodied son. It was argued that the defender's family and position in life required the expenditure of all his income, and that he had not the superfluity which is a condition precedent to the obligation to contribute aliment. The Sheriff has given careful consideration to the whole circumstances stated on record, and although he does not doubt that the defender may be in a position which, in a popular phrase, gives him 'enough to do to make both ends meet,' the Sheriff is unable to say that the defender cannot reasonably be asked to contribute 1s. a-week towards the aliment of the mother of his wife. This sum is contributed by three other of her sons-in-law, who do not appear to be in better circumstances than the defenders.

"The Sheriff cannot give decree for any arrears, so the decree will run from the date of citation.

"The pursuer must have expenses, but of consent they may be taxed on the lower scale. The Sheriff was informed at the debate that, in order to save expenses, this case was left to the Sheriff-Substitute to dispose of, without debate. The motive was creditable, and the Sheriff does not wish to say anything to discourage such a practice. But where, as here, there are authorities bearing on the point for decision, it would be proper to hand a note of them to the Sheriff-Substitute, and not merely to cite them on appeal.

(Intd.)

"Æ. J. G. M."

Act. Soutar—Al. Gorrie.

Notes of American and Colonial Cases.

MESSANGER of R. M. COURT.—*Execution of Writ—Negligence—Ord.* 37, 1828, § 8—*Act* 20, 1856, § 53, and *Sched. B.* § 58 (August 7, 20).—In an action against the Messenger of a Magistrate's Court for damages sustained owing to his negligence in executing a certain writ: *Held*, that there was some evidence of negligence on the part of the defendant, but that, as it did not appear that the plaintiffs had sustained any damages thereby, the action must fail. Where property which the Messenger was about to attach was claimed by a third party, and he thereupon reported the claim to the plaintiffs' attorney, and applied for an indemnity which was not given: *Held*, that in the circumstances of the case he was justified in not proceeding with the attachment.—*L. & S. A. Exploration Co. v. Haybittel*, High Court of Griqualand.

Appellant was charged before the Landdrost Court of Jacobsdal with breach of the peace. He objected to the Landdrost trying him, on the ground of personal enmity. The Landdrost dismissed the objection, holding that a reconciliation had taken place, and there was no longer any ill-will on his side, and after trial found the appellant guilty and sentenced him. *Held*, that as the objection was *bonâ fide*, and apparently based on reasonable grounds, the Landdrost could not decide on it, but should have declined to hear the case. Conviction quashed.—*Howard v. The State*, High Court, Orange Free State.

(September 8.)—By Art. 114, Ordinance 1, 1887, an attorney is not allowed to charge when conducting his own case as party in a cause. X., an attorney defendant, engaged Z. as his attorney, and was employed by the latter to do the copying work at the price usually paid to "copyists." *Held*, that this did not fall under the prohibition.—*Baily v. Benneld*, High Court, Orange Free State.

EVIDENCE.—Judicial notice is taken of the meaning of words in the English language, and of such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence.—*Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. Rep. 570.

Such notice will be taken of the fact that cider is alcoholic.—*Ibid*.

TRADE MARKS.—*Equity—Grounds of equitable relief—No protection to the publisher.*—The jurisdiction of a court of equity to give relief against the violation of a trade mark, rests not upon the ground that the defendant is committing a fraud on the public, but entirely on the ground that the defendant is violating a property right of the complainant.—*Schneider v. Williams*, Ct. Ch. N. J., 14 Alt. Rep. 801.

TRADE MARKS.—*What necessary to acquire title to trade mark.*—Three things are requisite to the acquisition of a title to a trade mark: *First*, the person desiring to acquire title must adopt some mark not in use to distinguish goods of the same class or kind, already on the market, belonging to another trader; *second*, he must apply his mark to some article of traffic; and, *third*, he must put his article, marked with his mark, on the market.—*Ibid*.

TRADE MARKS.—*Mere adoption of a trade mark, etc.*—Mere adoption of a mark, and a public declaration that the mark so adopted will be used to distinguish goods to be put on the market at a future time, create no right. No title arises until the thing is actually on the market, marked with the particular mark.—*Ibid*.

TRADE MARKS.—The name "Acid Phosphate," applied to a medicinal preparation, describing with reasonable exactness the character and qualities of the preparation, cannot be exclusively appropriated as a trade mark, as it is descriptive.—*Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524.

The use of a descriptive name as a trade mark will not be enjoined at the suit of another party using the same name, where defendant properly distinguished his preparation from complainant's and sold it as his own.—*Ibid*.

PHYSICIANS AND SURGEONS.—*Revocation—"Touting" advertising—Revocation of certificate for unprofessional conduct.*—Under the Act of 1877, section 10, regulating the practice of medicine in Illinois, authorizing the State Board of Health to revoke certificates issued for the practice of medicine for "unprofessional or dishonourable conduct," a charge that the holder of a certificate made statements and promises with reference to the cure of sick which are calculated to deceive and defraud the public, though sufficient to authorize a revocation, is not sustained by evidence of an advertisement headed "A Surgical Triumph," and reciting that the holder had opened an office for a limited time, nor by any other advertisements reciting his wonderful attainments and success.—*People v. M'Coy*, Sup. Ct. Ill., 17 N. East. Rep. 786.

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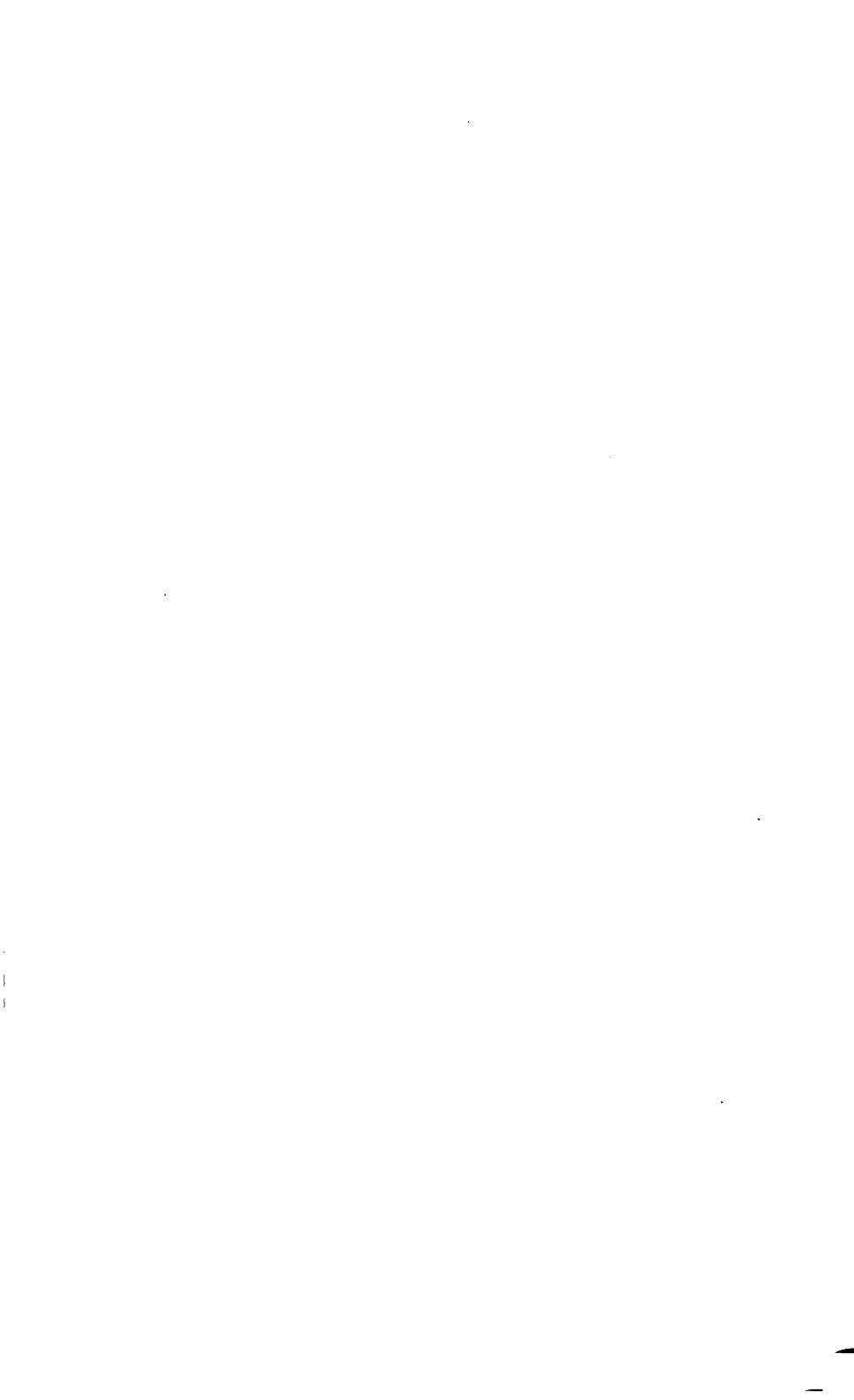
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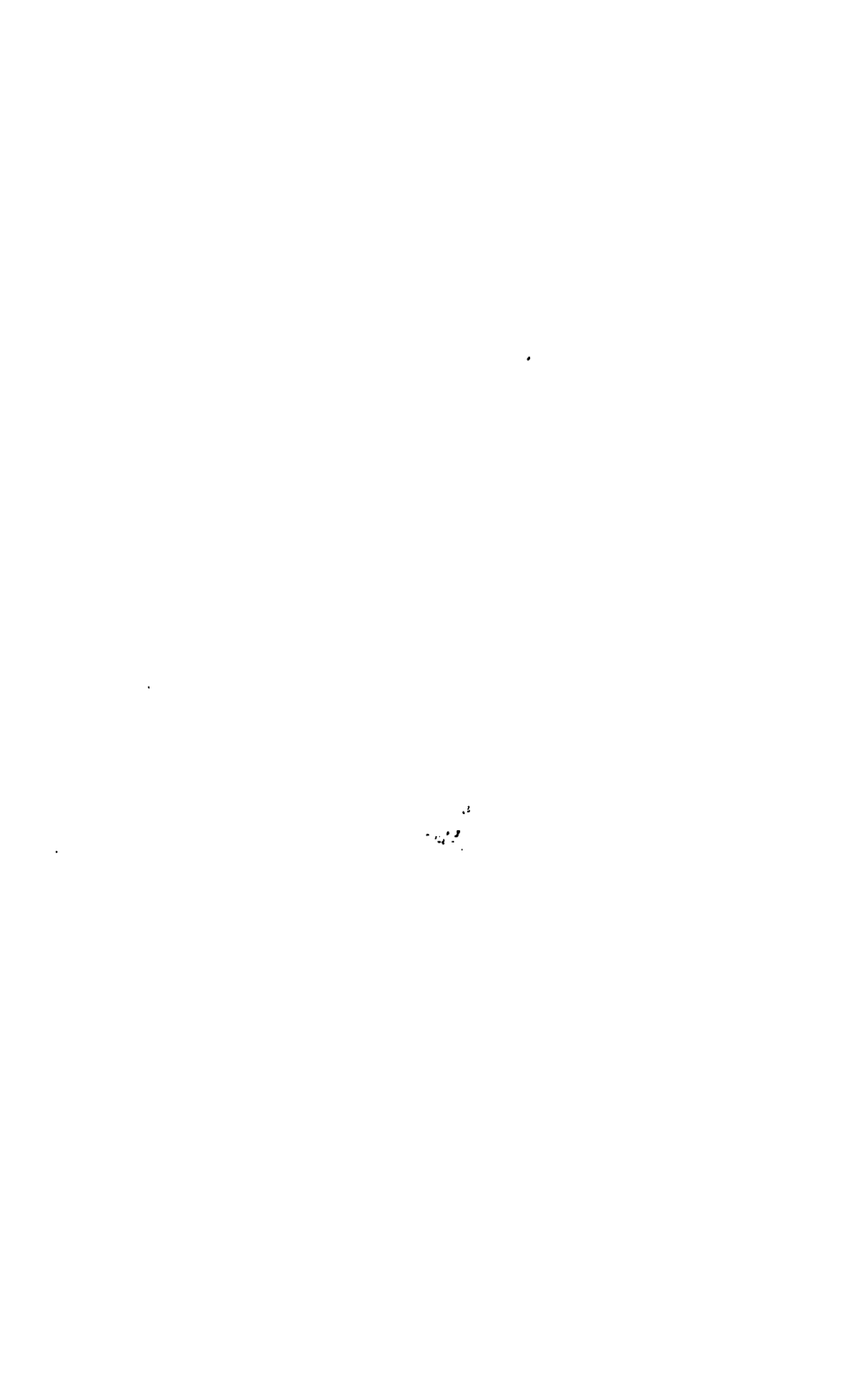
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